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THE UNIFORMITY CLAUSE OF THE WISCONSIN CONSTITUTION

JACK STARK*

I. INTRODUCTION

Like the Commerce Clause of the federal constitution, the uniformity clause,¹ article VIII, section 1, of the Wisconsin Constitution is a terse statement of organic law that has significantly influenced the statutory law of taxation and has been the basis for considerable litigation. More than one hundred Wisconsin appellate court uniformity clause cases have been reported. Although several issues remain unlitigated, the reported cases deal with a large number of complex issues. However, the body of uniformity clause litigation desperately needs clarification² because of its complexity and its importance to Wisconsin tax law and to major state aid programs.

At first glance, the clause seems simply to ensure equality, which is especially important for property tax payers because they, unlike other taxpayers, play a zero-sum game. They play a zero-sum game because each taxing jurisdiction levies taxes that will generate the amount of revenue it wishes to collect from its taxpayers.³ The taxing jurisdiction then divides

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1. WIS. CONST. art. VIII, § 1 (amended 1974) reads: Rule of taxation uniform; income, privilege and occupation taxes.

The rule of taxation shall be uniform but the legislature may empower cities, villages or towns to collect and return taxes on real estate located therein by optional methods. Taxes shall be levied upon such property with such classifications as to forests and minerals including or separate or severed from the land, as the legislature shall prescribe. Taxation of agricultural land and undeveloped land, both as defined by law, need not be uniform with the taxation of each other nor with the taxation of other real property. Taxation of merchants' stock-in-trade, manufacturers' materials and finished products, and livestock need not be uniform with the taxation of real property and other personal property, but the taxation of all such merchants' stock-in-trade, manufacturers' materials and finished products and livestock shall be uniform except that the legislature may provide that the value thereof shall be determined on an average basis. Taxes may also be imposed on incomes, privileges and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided.

2. For a partial treatment of that case law, see Frank L. Bixby, Note, *Wisconsin Constitution Article VIII, Section 1—Partial Exemption of Value as an Inducement to Proper Subdivision*, 1953 WIS. L. REV. 141; David L. Kinnamon, Note, *The Uniformity Clause, Assessment Freeze Laws, and Urban Renewal: A Critical View*, 1965 WIS. L. REV. 885.

3. For examples of statutory authority to levy property taxes for various governmental bodies, see WIS. STAT. §§ 120.10, 120.12(3), 120.44(1) (1991-92) (school districts); WIS. STAT. § 38.16 (1991-92) (vocational, technical, and adult education districts); WIS. STAT. § 70.62(1)

that amount by the total assessed value of all the taxable property in the jurisdiction to determine its mill rate. Next, it computes each taxpayer's obligation by multiplying that mill rate by the assessed value of his or her property. Therefore, if one taxpayer's assessment is too low, the mill rate applicable to every piece of taxable property in the jurisdiction that contains the inaccurately assessed property will be higher than it ought to be. Because any unfairness inevitably spreads throughout the taxing jurisdiction, some early courts invalidated an entire levy if it was determined that one taxpayer was treated nonuniformly.⁴

Equality has its attractions, but early in the history of uniformity clause litigation the court recognized that absolute equality would often impede economic development and property tax relief. The pressures on the legislature and the court to facilitate economic development⁵ were strong during the second half of the nineteenth century. During the twentieth century, property taxes appeared more onerous because it became clear that their burden was not distributed according to taxpayers' ability to pay. As a result, pressure for property tax relief began to oppose pressure for equality. These competing concerns also have been a major cause of the fairly large number of poorly reasoned and wrongly decided uniformity clause cases.

This Article analyzes Wisconsin's uniformity clause by first tracing its development in the two state constitutional conventions and its amendments, and then explaining the tangled early history of uniformity clause case law. Later sections deal with the taxes to which the clause applies, the major issues that have been litigated, the geographical area over which uniformity must pertain, the kinds of permissible classification, and the remedies available to successful uniformity clause litigants.

II. FRAMING THE ORIGINAL UNIFORMITY CLAUSE

To find a more complete meaning of the uniformity clause, one must examine the precedents for, the framing of, and the amendments to the uniformity clause. Uniformity clauses appear to be indigenous to this coun-

(1991-92) (counties); WIS. STAT. § 62.11(5) (1991-92) (cities); WIS. STAT. § 61.46 (1991-92) (villages); WIS. STAT. § 60.10 (1991-92) (towns); WIS. STAT. § 70.58 (1991-92) (state, and particularly, state forestation tax, which is the only state property tax, and mill rate); WIS. STAT. § 33.31(3) (1991-92) (inland lake districts). A gross property tax is the sum of a taxpayer's obligations to all of the jurisdictions that contain taxable property belonging to the taxpayer. Credits are subtracted to determine the net bill.

4. See, e.g., *Slauson v. City of Racine*, 13 Wis. 444 (1861); see also *Kneeland v. City of Milwaukee*, 15 Wis. 497 (1862) (following an unreported, unconvincing case rather than voiding taxes retroactively).

5. For a detailed tracing of that impetus, see JAMES W. HURST, *LAW AND ECONOMIC GROWTH: A LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN 1836-1915* (1964).

try.⁶ They comport with political ideals, such as equality and equity, that motivated this country's Founders. In the first reported Wisconsin uniformity clause case, the court noted that "[t]he theory of our government is, that socially and politically all are equal."⁷ Also, drafters of state constitutions were probably motivated by a concern that legislators or local officials would fall victim to political pressures and grant favorable tax treatment to influential property owners. This concern has some basis, as several early cases attest.⁸ Nevertheless, the exact motives for the first uniformity clause have not been established. In fact, it is not clear which state first included such a clause in its constitution. One commentator believes that Tennessee's, which was adopted in 1796, was the first,⁹ but another believes that other states had earlier, albeit more vague, uniformity clauses.¹⁰ In any event, when the convention that drafted the Wisconsin Constitution¹¹ met, it had precedents for including a uniformity clause. By one count, at the time of that convention, ten states had uniformity clauses in their constitutions and nineteen did not.¹² If one analyst of state uniformity clauses is correct, however, Wisconsin was the first state to phrase a uniformity clause as it did, with Ohio, Michigan, and New Jersey later phrasing their clauses in a similar fashion.¹³ After Wisconsin's constitution was ratified, the list of states with uniformity clauses grew. Today only two states, Connecticut and New York, and perhaps a third, Iowa, do not have uniformity clauses in their constitutions.¹⁴

The 1848 Wisconsin constitutional convention had another precedent for a uniformity clause: the constitution that was adopted by the 1846 convention but rejected by the people. The 1846 convention's Committee on Finance, Taxation, and Public Debt drafted a clause, which was included in the document, specifying that "[a]ll taxes to be levied in this state, at any time, shall be as nearly equal as may be."¹⁵ The 1846 convention had

6. For a treatment of the question of origin, see William L. Matthews, Jr., *The Function of Constitutional Provisions Requiring Uniformity in Taxation*, 38 Ky. L.J. 31 (1949-50).

7. *Knowlton v. Board of Supervisors*, 9 Wis. 378, 387 (1859).

8. One such case involved a tax official's deliberate omission of an opulent new hotel from the tax rolls. See *Weeks v. City of Milwaukee*, 10 Wis. 186 (1860).

9. Matthews, *supra* note 6, at 41; see also *Wisconsin Cent. R.R. v. Taylor County*, 52 Wis. 37, 60, 8 N.W. 833, 838 (1881).

10. WADE J. NEWHOUSE, CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION 612 (1959).

11. The people of the state voted not to ratify the constitution drafted by the first convention.

12. *Taylor County*, 52 Wis. at 62, 8 N.W. at 839.

13. See generally NEWHOUSE, *supra* note 10 (classifying uniformity clauses on the basis of phrasing).

14. See generally *id.*; Matthews, *supra* note 6.

15. THE CONVENTION OF 1846, at 90 (Milo M. Quaife ed., 1919).

cleared the ground for a clause of that type by defeating a resolution that would have inserted a provision exempting real estate from taxation.¹⁶ The reports of the debates over the uniformity clause reveal that two delegates supported such a clause in order to enhance social, political, and economic equality. One newspaper reporter attributed to John H. Rountree the opinions that "our present laws did not secure a just and equitable valuation of property as the rule of taxation; and it was this kind of partiality and favoritism extended to particular kinds of property which he wishes to see prohibited by the constitution."¹⁷ Similarly, Warren Chase, alluding to the defeat of the real estate exemption, pointed out that "they had already successfully combated the principle of exempting certain privileged kinds of property from taxation."¹⁸

The 1848 convention began with the 1846 version of the clause. Edward Whiton added "and shall be levied upon such property as the legislature shall prescribe."¹⁹ After Chase's suggestion to substitute "practicable" for "may be"²⁰ was accepted, Whiton successfully moved to replace the first half of the clause with "the rule of taxation shall be uniform throughout this state."²¹ The Committee on Revision and Arrangement struck the last three words.²² The result was as follows: "The rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe." Even at that point, the uniformity provision had grown beyond a clause. Strictly speaking, "The rule of taxation shall be uniform" is the uniformity clause. The rest of the sentence, including the material added later by amendment, is elaboration. This Article, however, will also consider other parts of article VIII, section 1, rather than just the uniformity clause in the most strict sense.

III. AMENDMENTS TO THE UNIFORMITY CLAUSE

Article VIII, section 1 has been amended five times.²³ At first it was not clear which taxes had to be uniform, and some early litigation cast doubt on the constitutionality of income taxes. Thus, in 1908, a sentence was added authorizing income taxes, privilege taxes, and occupational taxes, and grad-

16. THE ATTAINMENT OF STATEHOOD 222 (Milo M. Quaife ed., 1928).

17. *Id.* at 402.

18. *Id.* at 413.

19. *Id.* at 403.

20. *Id.* at 404.

21. *Id.*

22. *Id.* at 727.

23. For a list of those amendments, see WISCONSIN LEGISLATIVE REFERENCE BUREAU, STATE OF WISCONSIN 1993-94 BLUE BOOK 200-39 (1993).

uated rates and exemptions for them. In 1927, the first sentence was expanded to authorize classification of property as to forests and minerals. That provision was moved into a separate sentence in 1941 in order to insert a clause allowing municipalities to use optional methods of collecting taxes.²⁴ An amendment ratified in 1961 allows merchants' stock-in-trade, manufacturers' materials and finished products, and livestock to be treated nonuniformly as compared to other property. Some persons wished to exempt those kinds of property, sometimes called "the three stocks," in order to create an economic incentive, and they preferred to achieve exemption by gradually reducing the tax on the property. The intermediate reduction steps created a partial exemption, which would have violated the uniformity clause.²⁵ In 1974, a sentence that allows nonuniform treatment of agricultural land and undeveloped land was added. This amendment was made to provide relief to owners of those kinds of land that were assessed according to their highest and best use instead of according to their present use.²⁶ Since 1974, minor changes in the taxation of agricultural land have been enacted.²⁷

IV. THE EARLY CASE LAW

The efforts of the Wisconsin Supreme Court during the early years of statehood to initiate satisfactory uniformity clause case law are one of the more unusual phenomena in the history of Wisconsin law.²⁸ Those efforts indicate some reasons for the problems of interpretation presented by the clause. The failure of a supreme court justice to write an opinion in the first uniformity clause case to be heard, the subsequent appending of a memorandum about that case to the second uniformity clause case to be heard, and the fundamental conflict between the two cases created a great deal of confusion. It took fifty-one years to clear away the confusion and to establish the first reported, not the first decided, case as the seminal one.

At issue in the first reported case, *Knowlton v. Board of Supervisors*,²⁹ was a statutory provision³⁰ in the Janesville Charter that limited property taxes on agricultural land. The facts seemed to be exactly of the kind that

24. WIS. STAT. §§ 74.11(2), 74.12 (1991-92).

25. WIS. STAT. § 70.111(17) (1991-92).

26. All property must be assessed at fair market value. WIS. STAT. § 70.32(1) (1991-92).

27. See, e.g., WIS. STAT. § 70.32(1r) (1991-92).

28. For other accounts of that phenomenon, see *Gottlieb v. City of Milwaukee*, 33 Wis. 2d 408, 147 N.W.2d 633 (1967); *State v. Chicago & N.W. Ry.*, 128 Wis. 449, 108 N.W. 594 (1906); *Kinnamon*, *supra* note 2, at 889-901.

29. 9 Wis. 378 (1859).

30. See 1854 Wis. Laws 179, § 5.

the drafters of the clause sought to preclude. The tax on agricultural land was less than that on other land, so a classification was made and different "rules" were applied to different kinds of property. The court invalidated the Janesville provision and stated, "The valuation must be uniform, the rate must be uniform."³¹ That reasoning seems impeccable, but the dissent argued that *Milwaukee & Mississippi Railroad v. Waukesha*, an 1855 unreported decision, ought to be followed.³² *Mississippi Railroad* tested the constitutionality of a gross receipts tax on railroads, under which their property was exempted from property taxes. The court held that uniformity within a class is enough to satisfy constitutional standards. The decision in *Knowlton* is attractive because of its congruence with the impulse behind the uniformity clause. By itself, however, that impulse is perhaps too simple for a complex economy.

Mississippi Railroad introduced complexity into uniformity clause case law by introducing pressure for economic development. The decision allowed the creation of different kinds of taxes that would reflect new economic realities and increasing revenue needs. On the other hand, the decision allowed unwarranted flexibility by defining uniformity as to classes of property, not as to all property. Thus, because any kind of differentiation could be justified by concocting classes, the uniformity clause would be virtually meaningless.

The court, after only two cases, was faced with diametrically opposed precedents, which embodied vastly different conceptions of taxation. An escape, however, was implicit in the court's statement in *Mississippi Railroad* that the gross receipts tax was a "bonus or compensation"³³ or consideration paid by the railroad for its property tax exemption, not a tax as that term is used in the uniformity clause. Unfortunately, it took decades for the court to realize that this statement would help resolve the dilemma.

The court made little progress in resolving the dilemma during the next few years. In *State ex rel. Attorney General v. Winnebago Lake & Fox River Plankroad Co.*,³⁴ the court relied on *Knowlton*. The court, ignoring the hint in *Mississippi Railroad*, decided that the gross receipts tax was subject to the uniformity clause and that it classified property and applied different rates to the classes.³⁵ The dissenting judge, following *Mississippi Railroad*, argued that uniformity within a class is sufficient. In *Weeks v. City of Mil-*

31. *Knowlton*, 9 Wis. at 389.

32. A memorandum purporting to summarize the unreported case was appended to *Knowlton*. See *id.* at 399-420.

33. *Id.* at 403.

34. 11 Wis. 34 (1860).

35. *Id.* at 40.

waukee,³⁶ decided in the same year, the court did not have to deal with the uniformity clause's meaning; it held that the clause did not apply to special assessments. In *State ex rel. Reedsburg Bank v. Hastings*,³⁷ the court ruled that a tax on the capital stock of banks was not subject to the uniformity clause. The statute authorizing that tax was not a product of the general taxing power, but rather "a kind of legislative act of the people."³⁸ Unconvincingly, the court based its reasoning on the assertion that the people had reserved the right to legislate on banking because a referendum on whether banking should be allowed in the state had been conducted. If that odd distinction between popular and legislative enactments made sense, the tax ought to have been invalidated because it was passed by the legislature, not by popular referendum. In *Slauson v. City of Racine*,³⁹ decided the next year, the issue again was a limit on the property taxes imposed on agricultural lands. The *Slauson* court followed *Knowlton* and invalidated the tax. In summary, the case law was confusing in 1861.

In 1862, the confusion multiplied when another gross receipts case, *Kneeland v. City of Milwaukee*,⁴⁰ came before the court. The court followed *Knowlton* and found nonuniformity in the omission of railroad property from the tax rolls because of a special tax already applied to the property.⁴¹ Realizing that, despite the philosophical attractiveness of *Knowlton*, adherence to that precedent would invalidate taxes retroactively for seven years, the court reheard and reversed *Kneeland* and overruled *Winnebago Lake & Fox River Plankroad Co.* The court stated that its purpose was to avoid financial chaos.

During the next two decades, the court decided several other uniformity clause cases, but none raised disturbing issues. It took yet another railroad case to do that. In *Wisconsin Central Railroad v. Taylor County*,⁴² at issue was a property tax exemption granted to a railroad for ten years. The facts presented the most pristine test of the *Mississippi Railroad* doctrine—that uniformity within a class is sufficient—because the class in question had only one member. The facts demonstrated the favors that the economically powerful could elicit if taxes need not be uniform in any meaningful way. The court approved the exemption, claiming that "[u]niformity of rule is entirely different from uniformity of subjects to which the rule is applica-

36. 10 Wis. 186 (1860).

37. 12 Wis. 52 (1860).

38. *Id.* at 56.

39. 13 Wis. 444 (1861).

40. 15 Wis. 497 (1862).

41. *Id.* at 506-10.

42. 52 Wis. 37, 8 N.W. 833 (1881).

ble.”⁴³ A better rationale perhaps would have been the legislature’s power to exempt property on the basis of the second part of article VIII, section 1. The court also reaffirmed *Mississippi Railroad*, not merely in the limited manner of the court in *Kneeland*, but on the merits. As a result, *Mississippi Railroad* replaced *Knowlton* as the bedrock of uniformity clause case law.

During the next twenty-five years, the court again operated only around the fringes of the uniformity clause, until it decided two more railroad cases. In *State v. Chicago & Northwestern Railway*,⁴⁴ a gross earnings tax on railroads’ income was at issue. The court followed *Mississippi Railroad*, particularly the strategy of distinguishing between taxes to which the uniformity clause applied and taxes to which it did not apply. The court held that the gross earnings tax “involves the contractual element, while taxation in the ordinary sense . . . [is] taxation on property, which is regulated by sec. 1, art. VIII, of the constitution.”⁴⁵ Here, finally, was the solution to the dilemma of *Knowlton* and *Mississippi Railroad*. The uniformity clause could be made applicable, in a rigorous and literal way, to property taxes. It could also be made inapplicable to other taxes and to situations in which the same property may have been subject to two taxes. The court indicated that uniformity within a class was not enough to satisfy the uniformity clause; thus, arguments about the precedential value of various cases could cease.

In the other railroad case of that same year, *Chicago & Northwestern Railway v. State*,⁴⁶ the court’s task was made easier by the legislature, which had changed the tax on railroads to an ad valorem tax. That change encouraged the court to return to the *Knowlton* line of cases, “[f]or the direct method [property taxation], the constitution puts all property chosen therefor into one class, leaving all other property outside thereof, and contemplates one rule and, so far as practicable, one rate of taxation, as said in the *Kneeland* case.”⁴⁷ The court, however, not quite ready to be completely rigorous and literal in applying the *Knowlton* rule, stated that “[l]aws as regards [sic] mere details, designed to be aids in applying the rule, may or may not violate it according as they reasonably are in furtherance of it or are manifestly otherwise.”⁴⁸

Among the “details” that the court found to be outside the purview of the uniformity clause were the assessment of franchises, the addition of

43. *Id.* at 94, 8 N.W. at 855.

44. 128 Wis. 449, 108 N.W. 594 (1906).

45. *Id.* at 484-85, 108 N.W. at 602.

46. 128 Wis. 553, 108 N.W. 557 (1906).

47. *Id.* at 604, 108 N.W. at 567.

48. *Id.* at 613, 108 N.W. at 570.

omitted property by the state board in determining the average rate to be applied against the assessed value, the treatment of mortgages, and the use of the prior year's rate. As to the assessment of franchises, the court (improbably, in light of assessors' testimony to the contrary) asserted that franchises related to nonrailroad property must also have been valued. The court's justifications for the other three differences were that the addition was done in good faith, that railroad mortgages are different from other mortgages, and that time constraints necessitated the practice. Thus, although the court certainly overreached in order to validate certain assessment practices, it also, together with its opinion in the companion case, freed other taxes from the uniformity clause's restraints and applied that clause to the property tax. After fifty-one years, the court was finally on a somewhat steady course.

V. DETERMINING THE TAXES TO WHICH THE CLAUSE APPLIES

Although the railroad cases of 1906 brought order to uniformity clause interpretation, they raised the issue of which taxes were subject to the clause. The answer, that it applies only to property taxes, is implicit in those cases, but it would take decades and dozens of cases before the court solidly established that rule. As previously discussed, cases about gross receipts taxes first confused, but later clarified, the case law. *Milwaukee & Mississippi Railroad v. Board of Supervisors* held that if the gross receipts tax on railroads was subject to the uniformity clause, it complied with that clause.⁴⁹ In *State ex rel. Attorney General v. Winnebago Lake & Fox River Plankroad Co.*,⁵⁰ the court decided that the uniformity clause applied to a gross receipts tax.⁵¹ In both the original trial and the rehearing of *Kneeland*, the court applied the uniformity clause to a gross receipts tax. However, in *State v. Chicago & Northwestern Railway*,⁵² the court decided that the clause did not apply to gross receipts taxes.⁵³ That court, it will be recalled, distinguished taxes that have a "contractual element"⁵⁴ from uniformity clause taxes.

In two cases from the Depression era, the court was almost faced with deciding whether the uniformity clause applied to gross receipts taxes imposed on individuals. One of those taxes was the Emergency Unemploy-

49. This is Justice Cole's recollection of this unreported case, as cited in *State ex rel. Attorney Gen. v. Winnebago Lake & Fox River Plankroad Co.*, 11 Wis. 34, 38 (1860).

50. 11 Wis. 34 (1860).

51. *Id.* at 42-44.

52. 128 Wis. 449, 108 N.W. 594 (1906).

53. *Id.* at 484-85, 108 N.W. at 602.

54. *Id.* at 546, 108 N.W. at 624.

ment Relief Income Tax of 1932, which was litigated in *Van Dyke v. Tax Commission*.⁵⁵ The plaintiff claimed that the tax was a gross receipts tax, not an income tax, and thus subject to the constitutional requirement of uniformity, rather than the constitutional authorization of progressive income taxes. The court, however, held that the provisions of the tax to which the plaintiff objected did not apply to him.⁵⁶ A similar tax, the Emergency Relief Tax of 1935, which was imposed on certain dividends, was at issue in *Welch v. Henry*.⁵⁷ The court held that, since the tax allowed deductions, it was an income tax, and therefore the strict uniformity clause requirements of article VIII, section 1 did not apply.⁵⁸

Almost ten percent of the uniformity clause cases involve special assessments, despite the well-established rule that the clause is not applicable to them. Such assessments are akin to property taxes because they are levied against real property and are entered on property tax rolls.⁵⁹ On the other hand, the measure of a special assessment is the benefit to the property rather than the property's value.⁶⁰ Assessments, therefore, resemble bills for services rather than general revenue taxes. That important difference suggests that special assessments should not be subject to the uniformity clause. Nevertheless, the court in *Weeks v. City of Milwaukee*⁶¹ arrived at the distinction between special assessments and property taxes by taking a circuitous route. The court pointed to the home rule provisions of the state constitution,⁶² which directed the legislature to restrict the power of cities and villages to tax and assess,⁶³ as evidence that the framers of the constitution intended a distinction in the uniformity clause between taxation and assessment. The court cited cases from other jurisdictions to support its position.

In another early case, *Lumsden v. Cross*,⁶⁴ the court used the same reasoning as in *Weeks* and arrived at the same result. A few years later, in *Bond v. City of Kenosha*,⁶⁵ by merely stating that assessments were not sub-

55. 217 Wis. 528, 259 N.W. 700 (1935).

56. *Id.* at 546, 259 N.W. at 708.

57. 223 Wis. 319, 271 N.W. 68 (1937).

58. *Id.* at 328-29, 271 N.W. at 72-73. An appeal to the United States Supreme Court on equal protection and due process grounds failed. *See Welch v. Henry*, 305 U.S. 134, *reh'g denied*, 305 U.S. 675 (1938). Previously, the plaintiff had unsuccessfully advanced an equal protection argument to the Wisconsin Supreme Court. *Welch v. Henry*, 226 Wis. 595, 277 N.W. 183 (1938).

59. WIS. STAT. § 70.66(4) (1991-92).

60. WIS. STAT. § 66.60(1) (1991-92).

61. 10 Wis. 186 (1860).

62. *Id.* at 203.

63. *Id.* at 195.

64. 10 Wis. 225 (1860).

65. 17 Wis. 292 (1863).

ject to the uniformity clause, the court revealed its belief that the law on the issue was settled. The *Bond* court cited *Weeks*, *Lumsden*, another Wisconsin case that actually is not a uniformity clause case, and an Ohio case.⁶⁶ In three twentieth-century cases,⁶⁷ the court tersely refused to apply the uniformity clause to special assessments.

The court held firmly to its position on special assessments even after the home rule provision of the state constitution was amended to delete the distinction between assessments and taxes. The argument that the amendment affected the status of special assessments for the uniformity clause was made in *City of Milwaukee v. Taylor*.⁶⁸ The court was unimpressed and held that if special assessments were not taxes at the time of *Weeks*, they were not taxes after the home rule provision was amended.⁶⁹ Thus, the removal of a major basis for deciding the first special assessment case under the uniformity clause did not cast doubt on the line of cases built on that first case.

A second argument for holding that the uniformity clause does not apply to special assessments first appeared in *Donnelly v. Decker*.⁷⁰ In that case, the court held that assessments to fund construction of a drainage ditch were made under the police power rather than under the taxing power and thus were not subject to the uniformity clause.⁷¹ Although tracing a governmental action back to a governmental power is somewhat artificial, that approach does focus on the purpose and effects of special assessments. A later special assessments case, *Golden v. Green Bay Metropolitan Sewerage District*,⁷² is tenuously related to *Donnelly* in that the court applied a standard appropriate to a police power case: "The fact that some parcels within those boundaries may not receive a direct benefit immediately does not invalidate the project in the absence of abuse or purely arbitrary action."⁷³ The court considered that standard to be a uniformity clause standard. In *Holt Lumber Co. v. City of Oconto*,⁷⁴ the court held that some injustice is not enough to invalidate a special assessment on constitutional

66. *Id.* at 296-98.

67. *See Duncan Dev. Corp. v. Crestview Sanitary Dist.*, 22 Wis. 2d 258, 125 N.W.2d 617 (1964); *Union Cemetery v. City of Milwaukee*, 13 Wis. 2d 64, 108 N.W.2d 180 (1961); *Lamasco Realty Co. v. City of Milwaukee*, 242 Wis. 357, 8 N.W.2d 372 (1943).

68. 229 Wis. 328, 282 N.W. 448 (1938).

69. *Id.* at 340, 282 N.W. at 455.

70. 58 Wis. 461, 17 N.W. 389 (1883).

71. *Id.* at 472, 17 N.W. at 393.

72. 210 Wis. 193, 246 N.W. 505 (1933).

73. *Id.* at 206, 246 N.W. at 510.

74. 145 Wis. 500, 130 N.W. 709 (1911).

grounds. The standard resembles the one in *Golden*, but in *Holt Lumber Co.* the court did not call it a uniformity clause standard.

Whatever the reason for believing that the uniformity clause does not apply to special assessments, the belief became so well established that in two fairly recent cases the court spent more time determining whether a charge was a special assessment than making a uniformity clause analysis. Special charges to pay the operating and maintenance costs of a sewerage system and to retire revenue bonds issued to fund that system were litigated in *Williams v. City of Madison*.⁷⁵ The court, assuming that special assessments were not required to be uniform, held that those charges were "not technically a special assessment"⁷⁶ because they were based in part on assessed value. Although the court considered the charges to be "closely akin in nature to [a special assessment],"⁷⁷ the other bases of those charges and the use of the revenue were enough to convince the court that the uniformity clause did not apply to them.

*City of Plymouth v. Elsner*⁷⁸ reached the opposite result, finding a charge not to be a special assessment and invalidating it on uniformity grounds. That charge was imposed on electrical service meters, was computed at different rates for residential and commercial meters, and was intended to raise revenue to purchase, lease, and maintain industrial sites. According to the court, the absence of tangible benefits to individual pieces of property distinguished the charge from special assessments.⁷⁹ The court did not deem it necessary to determine whether the charge was an excise tax or a property tax. If it was the latter, it was invalid under the uniformity clause because of the variation in rates.⁸⁰

All uniformity clause cases involving the income tax arose after the 1908 amendment to article VIII, section 1, which authorized that tax. Thus, it is unknown whether an income tax would have violated the original version of that section. Probably only a flat rate tax with no deductions would have been held to be uniform. The uniformity clause cases involving the income tax not only make it clear that income taxes need not be uniform, but also further define some of the terms used in the 1908 amendment to aid in the determination of whether that amendment authorized the tax in question.

75. 15 Wis. 2d 430, 113 N.W.2d 395 (1962).

76. *Id.* at 443, 113 N.W.2d at 402.

77. *Id.*

78. 28 Wis. 2d 102, 135 N.W.2d 799 (1965).

79. *Id.* at 108-09, 135 N.W.2d at 803.

80. *Id.* at 105, 135 N.W.2d at 801-02.

The first cases testing the constitutionality of the income tax were the *Income Tax Cases*.⁸¹ The courts held that the 1908 amendment and the enactment of the income tax statutes had fulfilled the legislature's intent:

By this act the legislature has, in substance, declared that the state's system of taxation shall be changed from a system of uniform taxation of property . . . to a system which shall be a combination of two ideas, namely, taxation of persons progressively, according to ability to pay, and taxation of real property uniformly, according to value.⁸²

The court tested income tax classifications by determining whether there was a "substantial difference of situation."⁸³ In *Hoepfer v. Wisconsin Tax Commission*,⁸⁴ a later court adopted that test. Another income tax case, *State ex rel. Manitowoc Gas Co. v. Wisconsin Tax Commission*,⁸⁵ concerned a tax on "income . . . derived from sources within the state or within its jurisdiction,"⁸⁶ under which a tax had been imposed on nonresident holders of the plaintiff's bonds. The court, following the *Income Tax Cases*, held that strict uniformity of the kind required by the original version of article VIII, section 1 does not apply to the income tax.⁸⁷ The court also generalized "that part of property constituting income shall be separately and differently taxed from all other property."⁸⁸

A few years later, *State ex rel. Atwood v. Johnson*,⁸⁹ a case concerning both a property tax and an income tax, came before the court. This case offered the court a chance to further distinguish between those taxes. Unfortunately, the court equivocated. The issue involved a combination of a tax on property and an income surtax that was devised to pay bonuses to World War I veterans. The property tax component was found to be uniform.⁹⁰ The court logically held that the uniformity clause "has no application to income tax,"⁹¹ but it also needlessly muddled the waters by making a uniformity clause analysis that harkened back to *Milwaukee & Mississippi*

81. 148 Wis. 456, 134 N.W. 673, 135 N.W. 164 (1912). The cases were dismissed in *Bolens v. Frear*, 231 U.S. 616 (1914).

82. 148 Wis. at 506, 134 N.W.2d at 688-89.

83. *Id.* at 513, 134 N.W. at 691.

84. 202 Wis. 493, 233 N.W. 100 (1930). This case, which involved a combination of household income, was reversed on due process and equal protection grounds. *See Hoepfer v. Tax Comm'n*, 284 U.S. 206 (1931).

85. 161 Wis. 111, 152 N.W. 848 (1915).

86. Wis. STAT. § 1087(m-2) (1911).

87. *Manitowoc Gas Co.*, 161 Wis. at 114, 152 N.W. at 850.

88. *Id.* at 116, 152 N.W. at 850.

89. 170 Wis. 218, 175 N.W. 589 (1919).

90. *Id.* at 241, 175 N.W. at 598.

91. *Id.* at 242, 175 N.W. at 599.

Railroad v. Board of Supervisors.⁹² That is, the court claimed that uniformity within a class was enough.⁹³ This discredited means of indirectly making the uniformity clause inapplicable to a tax would have been best left unexhumed.

In addition to deciding whether the income tax must be strictly uniform, the court has had to define "income" as it is used in the uniformity clause. The first case that did so was *Van Dyke v. City of Milwaukee*,⁹⁴ which concerned the income taxation of dividends. The plaintiff argued that part of the money paid as dividends is a return of capital, so that taxation of dividends goes beyond the constitutional authorization of a tax on income. The court interpreted income "in its common, ordinary meaning, and not in its strict, technical, or true economic sense."⁹⁵ The court did not specify that term's ordinary meaning, but implied that it was broad. A few years later, the court found that taxing dividends was constitutional.⁹⁶ In *State ex rel. Dulaney v. Nygaard*,⁹⁷ the third dividend case, the court made explicit that which was implicit in *Van Dyke*, stating that the uniformity clause "subjects to taxation 'incomes' without limitation."⁹⁸ A more specific definition of income, "profit or gain derived from capital or labor or both combined," appeared in two other early cases.⁹⁹ In a fourth dividend case, *Marine National Exchange Bank v. Department of Taxation*,¹⁰⁰ the court assumed that including dividends in income for tax purposes did not violate the uniformity clause,¹⁰¹ and it then addressed the issue of whether the dividends were constructively received. Although taxpayers can cogently argue that a tax on dividends is not a tax on income, the court has always found that tax to be authorized by article VIII, section 1. The court's apparent determination to find that the uniformity clause authorizes an income tax on any kind of gain has probably been a major reason why the meaning of "income" in that clause has not been litigated in the state supreme court for decades.

92. See *Knowlton v. Board of Supervisors*, 9 Wis. 378, 399-420 (1859), for a memorandum purporting to summarize this opinion.

93. *Atwood*, 170 Wis. at 242, 175 N.W. at 598-99.

94. 159 Wis. 460, 146 N.W. 812 (1915). The case was upheld on rehearing on other grounds. See *Van Dyke v. City of Milwaukee*, 159 Wis. 468, 469-70, 150 N.W. 509, 510 (1915).

95. *Id.* at 464, 146 N.W. at 813.

96. *State ex rel. Manitowoc Gas Co. v. Wisconsin Tax Comm'n*, 161 Wis. 111, 152 N.W. 848 (1915).

97. 174 Wis. 597, 183 N.W. 884 (1921).

98. *Id.* at 607, 183 N.W. at 887.

99. See *State ex rel. Wisconsin Trust Co. v. Widule*, 164 Wis. 56, 61, 159 N.W. 630, 632 (1916); *State ex rel. Bundy v. Nygaard*, 163 Wis. 307, 310, 158 N.W. 87, 88 (1916).

100. 12 Wis. 2d 154, 107 N.W.2d 157 (1961).

101. *Id.* at 157, 107 N.W.2d at 158.

"Reasonable exemptions" is another term added by the 1908 amendment that has been an issue in litigation. *State ex rel. Warren v. Nusbaum*¹⁰² addressed an income tax exemption¹⁰³ for income earned on notes and bonds issued by the Wisconsin Housing Finance Authority.¹⁰⁴ The court found that the Authority was engaged in "essential public functions" and, thus, exempting its financial instruments was reasonable under the uniformity clause.¹⁰⁵ Like the equal protection standard, the reasonableness standard is not difficult to meet. The court's search for a public purpose in *Nusbaum* also resembles the analysis of police power cases. However reasonableness is defined, challenging income tax exemptions under the uniformity clause does not appear to be a promising endeavor. Potential litigants seem to have realized that success is unlikely because *Nusbaum* is the only case on that issue. In short, the 1908 amendment appears to have accomplished its purpose. It removed all uniformity clause impediments to the legislature's efforts to construct whatever type of income tax it wished.

The other tax that has often been litigated on uniformity clause grounds is the inheritance tax. The first case of that type, *Black v. State*,¹⁰⁶ set a rational course for the others. The court called the tax a privilege tax and therefore found that it is not bound by the constitutional requirement of absolute uniformity. Thus, relevant classifications may be made and exemptions granted, if both are reasonable.¹⁰⁷ However, the tax failed to pass constitutional muster on equal protection grounds. It granted a \$10,000 exemption to each estate so that persons who inherited the same amount from different estates would pay different amounts of tax.¹⁰⁸ After the legislature responded to *Black* by changing the exemption,¹⁰⁹ the inheritance tax was assailed again in *Nunnenmacher v. State*.¹¹⁰ Again the court applied only a reasonableness standard,¹¹¹ not an absolute uniformity standard, to the tax and held for the state. The constitutional amendment that authorized privilege taxes adopted the reasonableness standard used in *Black* and *Nunnenmacher*.

102. 59 Wis. 2d 391, 208 N.W.2d 780 (1973).

103. See Wis. STAT. § 234.28 (1991-92).

104. The Wisconsin Housing Finance Authority is now called the Wisconsin Housing and Economic Development Authority. See Wis. STAT. § 234.01(1) (1991-92).

105. *Warren*, 59 Wis. 2d at 439, 208 N.W.2d at 808.

106. 113 Wis. 205, 89 N.W. 522 (1902).

107. *Id.* at 222, 89 N.W. at 528.

108. *Id.*

109. See 1903 Wis. Laws ch. 44, § 4.

110. 129 Wis. 190, 108 N.W. 627 (1906).

111. *Id.* at 221, 108 N.W. at 637.

In *Beals v. State*,¹¹² the plaintiff cited dicta in *Nunnemacher* which stated that the rights to devise and inherit are natural rights. The plaintiff argued that these natural rights are property rights and that taxes imposed on them must be strictly uniform under article VIII, section 1.¹¹³ The court disagreed and simply followed *Nunnemacher*. In *State v. Pabst*,¹¹⁴ the court upheld the inheritance tax, citing both *Nunnemacher* and *Beals*. *Will of Harnischfeger v. Harnischfeger*¹¹⁵ concerned a statute that included the value of gifts made within two years of death in the value of property subject to the inheritance tax. In a motion for rehearing it was argued that the provision, in effect, imposed a graduated tax on gifts contrary to the uniformity clause. That argument allowed the court to decide whether the uniformity clause applied to the gift tax. However, the court declined the gambit and denied the motion without argument. The gift tax's status under the uniformity clause has not been decided, but the chances are that, like the inheritance tax, the gift tax would not have been held subject to strict uniformity. No one will ever know, however, because, like the inheritance tax, the gift tax has been discontinued. In *Will of LeFeber v. State*,¹¹⁶ a special inheritance tax, a provision devised to generate funds that could be used to relieve victims of the Depression, was at issue. *LeFeber* was decided as an equal protection case (the tax was found to violate it); the court assumed that the uniformity clause did not apply to the special inheritance tax.

Throughout this sequence of inheritance tax cases, the court ruled consistently. However, the most recent case, *Estate of Heuel v. State*,¹¹⁷ was inconsistent with past cases. The opinion began by adhering to *Beals* and asserting that the uniformity clause in the strict sense did not apply to the inheritance tax. Then the court asserted that, for the inheritance tax, the uniformity clause "means simply taxation which acts alike on all persons similarly situated."¹¹⁸ Thus, the court took the same false steps that were taken in *State ex rel. Atwood v. Johnson*:¹¹⁹ the failure to explicitly state that strict uniformity does not apply to a tax and the failure to then turn the case into an equal protection case. Despite this development, strict uniformity is clearly not a requirement for the inheritance tax.

112. 139 Wis. 544, 121 N.W. 347 (1909).

113. *Id.* at 555, 121 N.W. at 349.

114. 139 Wis. 561, 121 N.W. 351 (1909).

115. 208 Wis. 317, 242 N.W. 153, *reh'g denied*, 208 Wis. 331, 243 N.W. 453, and *cert. dismissed*, 287 U.S. 567 (1932) (lack of a substantial federal question).

116. 223 Wis. 393, 271 N.W. 95 (1937).

117. 4 Wis. 2d 400, 90 N.W.2d 634 (1958).

118. *Id.* at 404, 90 N.W.2d at 637 (citation omitted).

119. 170 Wis. 218, 175 N.W. 589 (1919).

Litigants have challenged a large number of other exactions on uniformity clause grounds. Two of those exactions resemble property taxes and help establish the boundary between the exactions subject to the clause and those not subject to it. One, the parking permit fee levied on mobile homes,¹²⁰ is imposed in lieu of property taxes. The court noted that the fee was for parking because it was not assessed on vacant mobile homes, those held for sale, or those used only for trips. Therefore, the court considered the fee an excise tax, not a property tax, and thus not subject to strict uniformity. Similarly, in *City of Plymouth v. Elsner*,¹²¹ the court did not decide whether a tax levied on electrical meters was an excise tax or a property tax. However, it did hold that if the tax was a property tax, it violated the uniformity clause because different rates were applied to residential meters than to commercial meters.¹²² The court found other grounds for overturning the tax if it was considered an excise tax.

Two taxes that resemble income taxes have also been challenged on uniformity clause grounds. The first, a capital stock tax, also resembles a property tax in that it is calculated on the basis of value without any deductions. Thus, these types of taxes offered the court another chance to draw a clear boundary between uniformity clause taxes and other taxes. Unfortunately, the capital stock case is *State ex rel. Reedsburg Bank v. Hastings*,¹²³ where the court reasoned that banking is a subject of legislation reserved to the people; therefore, a bank tax need not be uniform. Seven years later, *Van Dyke v. State*¹²⁴ confronted a slightly different tax: one imposed on bank shares.¹²⁵ The court decided that a federal statute authorizing states to tax the shares of national banks would validate this tax on uniformity clause grounds. Thus, the court did not apply a uniformity clause analysis. These two cases do not clearly indicate whether taxes that have some property tax characteristics are subject to the uniformity clause. Nevertheless, despite the lack of an explicit holding on the subject, one may safely conclude from the court's predilection for limiting the taxes to which the clause applies that it will not expand the clause's scope to include taxes of this type.

Premium taxes, which have little in common with the property tax and more in common with the income tax, have been litigated several times. In

120. WIS. STAT. § 66.058(3) (1991-92); see also *Barnes v. City of West Allis*, 275 Wis. 31, 81 N.W.2d 75 (1957).

121. 28 Wis. 2d 102, 135 N.W.2d 799 (1965).

122. *Id.* at 106, 135 N.W.2d at 801-02.

123. 12 Wis. 52 (1860).

124. 23 Wis. 655 (1869), *aff'd*, 154 U.S. 581 (1871).

125. *Id.* at 656.

one of these cases, *Fire Department v. Helfenstein*,¹²⁶ the court sounded for the first time a theme that, as we have seen, has occasionally appeared in the case law: alluding to the police power to identify taxes that are free of the bonds of the uniformity clause.¹²⁷ Specifically, the court held that the state may decide whether a business will be allowed to operate and, if the state allows operation, it may impose a tax that would not be subject to strict uniformity.¹²⁸ One difficulty with this analysis is that it is too broad. This type of analysis could be used to make the uniformity clause inapplicable to the property tax on businesses, a result that would throw the uniformity clause case law into chaos. Moreover, the tax in this case appears to be designed to raise general revenue, not to fund an administrative system available to the taxpayer. It is a tax, not a license fee subject to the police power. The police power would have been more relevant to a premium tax if the proceeds had been used, as some of them are now, to provide funds for volunteer fire departments and thus promote health and safety.¹²⁹

In *Travelers' Insurance Co. v. Fricke*,¹³⁰ the court adhered to the precedent in *Helfenstein*, distinguishing between a premium tax and the apparently similar gross receipts tax on railroads because the latter was imposed on an "inherently lawful business."¹³¹ This unconvincing argument indicates the flaw in the reasoning of the earlier case and the difficulty the court had during the nineteenth century in understanding the uniformity clause and its purpose. The 1908 amendment to article VIII, section 1, which authorizes not only income taxes but also taxes on "privileges and occupations," made it much easier for the court to analyze premium taxes. Also, the only other insurance company case, *Northwestern Mutual Life Insurance Co. v. State*,¹³² brought on uniformity clause grounds, involved a license fee, which is more obviously a privilege tax.

Taxes that are imposed in return for the right to conduct business have also been alleged to violate the uniformity clause. In *State v. Whitcom*,¹³³ the only case on point decided before the 1908 amendment, a peddler's license was at issue. The court asserted that there was a boundary between uniformity clause taxes and police power taxes, but declined to place this

126. 16 Wis. 142 (1862).

127. *Id.* at 145.

128. *Id.*

129. See WIS. STAT. § 101.573 (1991-92).

130. 99 Wis. 367, 74 N.W. 372 (1898).

131. *Id.* at 374, 74 N.W. at 374.

132. 163 Wis. 484, 155 N.W. 609, 158 N.W. 328 (1916), *aff'd*, 247 U.S. 132 (1918).

133. 122 Wis. 110, 99 N.W. 468 (1904).

license fee on either side of the boundary. Its reason for declining to do so cast doubt on that distinction's validity; the court claimed that the same analysis applies to both kinds of tax. The court's analysis more closely resembled an equal protection analysis. The court decided that the classification was unreasonable because there were many exemptions and the fee was based on the peddler's means of locomotion. *Whitcom* illustrates the difficulty the court had in deciding the constitutional status of occupational taxes. The uniformity clause, therefore, loomed as a barrier to rational tax policy. The year after *Whitcom*, probably not by coincidence, the legislature passed on first consideration the amendment that authorized taxes on privileges and occupations.

After that amendment, occupational tax and privilege tax cases became easier to decide. The court had little trouble even with a case that came before it in an unusual posture. The Milwaukee Tax Commissioner argued in *State ex rel. Bernhard Stern & Sons v. Bodden*¹³⁴ that an occupational tax on grain elevators violated the uniformity clause. The commissioner asserted that, because an elevator operator paid an occupational tax, it was nonuniform to exempt from the property tax grain owned by the operator. The Commissioner's motive was to expand the city's tax base. Oddly, a tax collector, not a taxpayer, invoked the uniformity clause. The court looked to the material added by the 1908 amendment to article VIII, section 1 to justify the occupational tax. It also looked to the original version of that section to justify the property tax exemption, which it found to be reasonable. In a later case, the court found that the same principles that applied to the occupational tax on handling grain in *Stern* applied to the occupational tax on handling coal.¹³⁵ These two cases demonstrate that the 1908 amendment does the same thing for occupational taxes that it does for the income tax: make it unnecessary for them to be strictly uniform.

As another case indicates, the same is true of taxes on privileges. *State ex rel. Froedert Grain & Malting Co. v. Tax Commission*¹³⁶ involved a tax on declaring and receiving corporate dividends. The court approved the tax because it was a privilege tax authorized by article VIII, section 1.¹³⁷ However, during the next year the court decided that a tax imposed on receiving certain dividends (the emergency relief tax of 1935) was an income tax, not a privilege tax.¹³⁸ The plaintiff argued that the tax was not an income tax because it was not levied on all income, but the court responded that that

134. 165 Wis. 75, 160 N.W. 1077 (1917).

135. *State ex rel. Consolidation Coal Co. v. Arnold*, 186 Wis. 609, 203 N.W. 373 (1925).

136. 221 Wis. 225, 265 N.W. 672 (1936).

137. *Id.* at 232, 265 N.W. at 675.

138. *Welch v. Henry*, 223 Wis. 319, 328, 271 N.W. 68, 72-73 (1937).

principle would make it impossible to levy an income tax, since an income tax necessarily exempts some income.¹³⁹ Despite the scarcity of relevant case law, the court in *Gottlieb v. City of Milwaukee*¹⁴⁰ included among its list of rules gleaned from uniformity clause litigation the maxim that "[p]rivilege taxes are not direct taxes on property and are not subject to the uniformity rule."¹⁴¹

The court resolved a recent case by declaring that a certain tax was a privilege tax and thus not subject to the constitutional requirements that apply to income tax. In *Mobil Oil Corp. v. Ley*,¹⁴² the taxpayer argued that the uniformity clause ought to apply to the franchise tax, which virtually all corporations pay instead of the income tax and which differs from the income tax mainly in that earnings from federal obligations are subject to it. The court rejected the argument that the franchise tax was really an income tax, pointing out that the franchise tax was measured by, not imposed on, income.

The court has consistently differentiated between fees and uniformity clause taxes. One example is a fee paid to a register of deeds.¹⁴³ In *Wadhams Oil Co. v. Tracy*,¹⁴⁴ the court held that a fee imposed for the inspection of petroleum products was not a tax but an exaction under the police power.¹⁴⁵ That power appeared to be appropriate because protection of health and safety was the motive for the inspection. In addition, the fees seemed merely to cover the administrative costs of the inspection rather than to accumulate revenue for general use. Using a police power analysis, rather than simply distinguishing fees from taxes, introduces confusion because it requires an analysis of purpose and of governmental powers.

A more recent fee case introduced another source of confusion. *Jordan v. Village of Menomonee Falls*¹⁴⁶ involved a fee for obtaining approval of a plat. The court held that if the charge was a tax, it was an excise tax and thus not subject to the uniformity clause.¹⁴⁷ That approach suggests that some fees may be taxes to which the uniformity clause applies. However, a simple distinction between fees and taxes would probably have established a more useful precedent.

139. *Id.*

140. 33 Wis. 2d 408, 147 N.W.2d 633 (1967).

141. *Id.* at 424, 147 N.W.2d at 641.

142. 142 Wis. 2d 108, 416 N.W.2d 680 (Ct. App. 1987).

143. See *Verges v. Milwaukee County*, 116 Wis. 191, 93 N.W. 44 (1903).

144. 141 Wis. 150, 123 N.W. 785 (1909).

145. *Id.* at 158-59, 123 N.W. at 788-89.

146. 28 Wis. 2d 608, 137 N.W.2d 442, *cert. dismissed*, 385 U.S. 4 (1965) (lack of federal question).

147. *Id.* at 622, 137 N.W.2d at 450.

There is even one sales tax case, *Ramrod Insurance v. Department of Revenue*,¹⁴⁸ in which the uniformity clause was an issue. The court held that it was a privilege tax and thus not required to be strictly uniform.¹⁴⁹ At issue was the exemption of occasional sales by persons who do not hold a seller's permit and the taxation of those sales by persons who do hold a seller's permit.¹⁵⁰ The plaintiff argued unsuccessfully that the difference involved nonuniformity.

In two cases taxpayers argued that the interaction of two taxes created nonuniformity. One is *State ex rel. Bernhard Stern & Sons v. Bodden*,¹⁵¹ which found constitutional on uniformity grounds property taxation of grain that depended on whether the owner was subject to an occupational tax for handling it. In *American Bank & Trust Co. v. Department of Revenue*,¹⁵² an argument was made that imposition of the income tax and the estate tax on the proceeds from the sale of a partnership interest was nonuniform. Rather than simply observing that neither tax is required to be strictly uniform, the court noted that two taxable events occurred, justifying two taxes.¹⁵³ One can plausibly conclude that the interaction of any two taxes, unless one of them is the property tax, would not violate the uniformity clause. The outcome of a case involving interaction of the property tax and another tax is somewhat more difficult to predict. Nevertheless, the point made in *American Bank & Trust* about the two taxable events would probably be relevant; thus, uniformity would be tested only in regard to the property tax.

Because many taxes have come under judicial scrutiny on uniformity clause grounds, it is useful to distinguish taxes to which strict uniformity applies from other taxes. As we have seen, the contrast between police power exactions and uniformity clause taxes appeared in cases such as *Wadhams*. However, the usefulness of that contrast is limited because it leads to another fairly difficult inquiry: whether the exaction was imposed under the police power. In *State ex rel. Harvey v. Morgan*,¹⁵⁴ the court cited a statement in the homestead credit law that the law was "enacted under the police power of the state."¹⁵⁵ This statement provided a rationale for holding that the rule of uniformity did not apply to the credit. A sim-

148. 64 Wis. 2d 499, 219 N.W.2d 604 (1974).

149. *Id.* at 502, 219 N.W.2d at 606.

150. WIS. STAT. § 77.51(9)(a) (1991-92).

151. 165 Wis. 75, 160 N.W. 1077 (1917).

152. 60 Wis. 2d 660, 211 N.W.2d 627 (1973).

153. *Id.* at 666, 211 N.W.2d at 630.

154. 30 Wis. 2d 1, 139 N.W.2d 585 (1966).

155. *Id.* at 13, 139 N.W.2d at 591.

pler generalization, that "[t]he rule of taxation shall be uniform,"¹⁵⁶ applies only to the property tax. Other taxes are subject to other requirements stated in article VIII, section 1 and in the case law interpreting that section. Because the property tax supplied the largest portion of governmental revenue in 1848, the framers of the state constitution probably did not contemplate applying that requirement to other state taxes. Taxes based on ability to pay, taxes directly related to a discrete service, taxes designed in part to redistribute wealth, or taxes designed to encourage or discourage certain activities cannot fulfill their functions if those taxes must be strictly uniform.

VI. ISSUES IN THE PROPERTY TAX PROCESS

The uniformity clause obviously applies to the property tax; however, the property tax is not a simple entity. Rather, it is a complicated administrative process performed by various government officials. Hence, many issues have been raised in uniformity clause cases about the property tax. It is useful to analyze those issues in the order in which they arise in the property tax process.

Perhaps the earliest step in the property tax process that has been considered by the court is the selection of assessors, which was among the issues in *State ex rel. Milwaukee Street Railway v. Anderson*.¹⁵⁷ The court held that those differences did not violate the uniformity clause.¹⁵⁸

In *Wisconsin Central Railroad v. Lincoln County*,¹⁵⁹ the central issue was the time of the assessment. When that case was decided, the deadlines for assessing real and personal property were different. The time of the assessment was crucial to the railroad because its ten-year exemption from property taxes expired before one of the assessment dates. The court considered the difference to be a mere detail, not a constitutional infirmity. That result makes sense because all of the taxable property in a taxation district cannot be valued on the same day, even though it is required by statute to be valued *as of* the same day, January 1.¹⁶⁰ Timing of assessments is also a problem if an improvement to real property is accidentally destroyed on any day other than January 1 so that for part of the year the actual value of the taxpayer's property is less than its assessed value. Despite the equitable arguments that a taxpayer could make in this situation,

156. WIS. CONST. art. VIII, § 1 (amended 1974).

157. 90 Wis. 550, 63 N.W. 746 (1895).

158. *Id.* at 568-69, 63 N.W. at 751.

159. 57 Wis. 137, 15 N.W. 121 (1883).

160. WIS. STAT. § 70.10 (1991-92).

granting relief by lowering the assessment would probably create an unconstitutional partial exemption.

The second part of the first sentence of article VIII, section 1 in its original version (and the beginning of the second sentence of that section after the 1941 amendment) allows the legislature to designate taxable property. The issue of taxability arose in *Milwaukee Electric Railway & Light Co. v. Tax Commission*¹⁶¹ and two companion cases.¹⁶² In the principal case, the plaintiff argued that taxing its motor vehicles under the utility tax and exempting them under the property tax was nonuniform. The court responded that the uniformity clause "does not require uniformity as to the subjects of taxation."¹⁶³ A more logical response would have simply cited the legislature's constitutional authority to bestow property tax exemptions.

The court has consistently held that property may not be partially exempted. The first reported uniformity clause case, *Knowlton v. Board of Supervisors*,¹⁶⁴ involved a limit on the taxes on agricultural land and created a partial exemption. The court stated, "There cannot be any medium ground between absolute exemption and uniform taxation."¹⁶⁵ Although both total exemption and partial exemption are nonuniform compared to taxation at full value, the former is explicitly authorized by article VIII, section 1. One of the few cases on partial exemption is among the handful of the more important uniformity clause cases. *Gottlieb v. City of Milwaukee*¹⁶⁶ is a declaratory judgment case that tested the constitutionality of the Urban Redevelopment Law,¹⁶⁷ which authorized certain municipalities to freeze the assessments on property in certain areas. The court reached back more than 100 years to *Knowlton* for a precedent and found the assessment freeze to be an unconstitutional partial exemption.

Courts have also been unreceptive to partial exemptions achieved indirectly. *Ehrlich v. City of Racine*¹⁶⁸ was a case brought by the city in hopes of nullifying an agreement to refund property taxes in excess of \$500 per acre for ten years in return for Ehrlich allowing a storm sewer to be built on his land. The court found this limit on taxes to be an unconstitutional partial exemption.¹⁶⁹ A similar case is *State ex rel. La Follette v. Torphy*.¹⁷⁰ A

161. 207 Wis. 523, 242 N.W. 313 (1932).

162. *Wisconsin Gas & Elec. Co. v. Tax Comm'n*, 207 Wis. 546, 242 N.W. 321 (1932); *Wisconsin-Michigan Power Co. v. Tax Comm'n*, 207 Wis. 547, 242 N.W. 352 (1932).

163. *Milwaukee Elec. Ry.*, 207 Wis. at 537, 242 N.W. at 318.

164. 9 Wis. 378 (1859).

165. *Id.* at 392.

166. 33 Wis. 2d 408, 147 N.W.2d 633 (1967).

167. WIS. STAT. §§ 66.405-425 (1991-92).

168. 26 Wis. 2d 352, 132 N.W.2d 489 (1965).

169. *Id.* at 356, 132 N.W.2d at 491.

declaratory judgment action tested the Improvements Tax Relief Law,¹⁷¹ which was designed to alleviate the frustration experienced by persons who have improved their property only to incur more costs because they have added to the property's assessed value. This Act gave an income tax credit for home and garage improvements that increased assessments. The court, as it did in *Ehrlich*, looked beyond the form of the credit to the resulting partial exemption and declared it unconstitutional.¹⁷²

The prohibition against partial exemptions is less important in relation to individual pieces of property than it is in relation to economic incentives and tax relief programs such as those at issue in *Gottlieb* and *La Follette*. As a consequence, the prohibition against partial exemptions is most significant as a restraint on the legislature. In fact, the Attorney General, responding to inquiries from the legislature, has opined nine times that proposed legislation would create an unconstitutional partial exemption. Those opinions discussed limiting term exemption for new buildings,¹⁷³ reducing property taxes on liquor equal to the amount of excise taxes paid on it,¹⁷⁴ assessing personal property by means of the average monthly inventory method,¹⁷⁵ assessing urban agricultural land according to present use rather than according to highest and best use,¹⁷⁶ exempting the first \$3750 of the assessed value of homesteads,¹⁷⁷ assessing as unimproved all land that as of May 1 is the site of a building that has never been occupied,¹⁷⁸ temporarily excluding the value of improvements to land in a conservation area,¹⁷⁹ assessing land according to its value,¹⁸⁰ and limiting the assessed value of agricultural land.¹⁸¹ The conclusion of each opinion was probably correct. Some of the proposed legislation scrutinized in those opinions is perhaps good public policy, but the uniformity clause inhibits the legislature from effecting it. This is not to say that the clause ought to be removed from the state constitution; one could also compile a list of possible horrors that it precludes.

170. 85 Wis. 2d 94, 270 N.W.2d 187 (1978).

171. WIS. STAT. §§ 79.24-.25 (1991-92).

172. *La Follette*, 85 Wis. 2d at 111-12, 270 N.W.2d at 194.

173. 20 Op. Att'y Gen. 265 (1931).

174. 38 Op. Att'y Gen. 276 (1949).

175. 46 Op. Att'y Gen. 156 (1957).

176. 52 Op. Att'y Gen. 170 (1963).

177. 52 Op. Att'y Gen. 143 (1963).

178. 52 Op. Att'y Gen. 180 (1963).

179. 66 Op. Att'y Gen. 326 (1977).

180. 68 Op. Att'y Gen. 76 (1979).

181. 68 Op. Att'y Gen. 179 (1979).

The situs of property for property tax purposes is important because the rates that are multiplied by the valuation to obtain the tax vary among jurisdictions. The situs of millions of feet of saw logs was litigated in *State ex rel. Holt Lumber Co. v. Bellew*.¹⁸² A statute provided that the situs of saw logs is their location unless the owner files an affidavit stating that he or she will process them. The court did not find a uniformity clause problem with the statute, because all of the property in the class was treated uniformly.¹⁸³ The difficulty with that reasoning, however, is the *Milwaukee & Mississippi Railroad v. Board of Supervisors*¹⁸⁴ decision, which approved classification into very small units so that uniformity is attenuated. Unfortunately, factual complications, such as property in transit, make it impossible to have a single rational rule of situs for all property. In fact, fairly elaborate rules about the situs of saw logs are still in the statutes.¹⁸⁵ Allowing some classification as to situs, as in *Holt Lumber*, may be the only acceptable alternative.

Oddly enough, assessment of property as a unit has been an issue in several uniformity clause cases. The first of them¹⁸⁶ was also in a sense a situs case. In the case, a railroad company challenged the assessment of all its property by the taxation district that contained its principal office, whereas property owned by other kinds of taxpayers was assessed by the district where the property was located. The court asserted that it was necessary to assess the company's property as a unit in order to value it accurately. Today, assessment of railroad property as a unit is required, and its situs is deemed to be the state capitol¹⁸⁷ because the state, not local units of government, tax that property. However, when two taxes are involved, the principle of unit assessment can have a less defensible result. In another railroad case,¹⁸⁸ a statute exempting docks and certain land from the railroad tax, thereby subjecting it to the property tax, was challenged. Again the court approved unit assessment of the railroad's property, but concluded that the interaction of the two taxes resulted in assessing the same property at different rates, thus violating the uniformity clause.¹⁸⁹ However, the legislature remedied the defects in the statutes that the court noted

182. 86 Wis. 189, 56 N.W. 782 (1893).

183. *Id.* at 195, 56 N.W. at 784.

184. For a memorandum purporting to summarize this unreported case, see *Knowlton v. Board of Supervisors*, 9 Wis. 378, 399-420 (1859).

185. See Wis. STAT. § 70.13(2), (7) (1991-92).

186. *State ex rel. Milwaukee St. Ry. v. Anderson*, 90 Wis. 550, 63 N.W. 746 (1895).

187. Wis. STAT. § 76.03(3) (1991-92).

188. *Minneapolis, St. P. & S. Ste. M. Ry. v. Douglas County*, 159 Wis. 408, 150 N.W. 422 (1915).

189. *Id.* at 413, 150 N.W. at 423.

in that case, and the next year in *State ex rel. City of Superior v. Donald*,¹⁹⁰ a case that had similar facts, the court approved the new taxation scheme. Thus, courts have consistently been willing to consider unit assessment as a uniformity clause issue, but it is not clear what kinds of factual situations will be found unconstitutional.

The method of evaluation has also been an issue in litigation, although not as often as one might think. In some cases, the court has been flexible and has allowed different methods. For example, in a case involving the difference between "full value" (the statutory standard for valuation of real property) and "true cash value" (the statutory standard for valuation of personal property), the court held that the uniformity clause is not violated if different terms describe "substantially the same method of valuation."¹⁹¹ The court was even more flexible in *State v. Pullman Co.*,¹⁹² in which it did not find a violation of the uniformity clause even though the taxpayer's sleeping cars were valued differently than other property it owned and differently than sleeping cars owned by other railroads. In *Flood v. Village of Lomira*,¹⁹³ the court approved a cash equivalency adjustment to an assessment. Thus, an assessor could determine the value of property that was recently purchased and financed by the seller by adjusting the sales price to reflect the difference between the financing terms and the normal financing terms.

On the other hand, the use by assessors of methods sufficiently different will cause the court to find a violation of the uniformity clause. In *State ex rel. Boostrom v. Board of Review*,¹⁹⁴ the taxpayer objected to an assessment in which the valuation of all agricultural land was increased by forty percent, whereas other kinds of property were individually assessed. The court considered the effect "substantial enough to result in an unequal burden of property taxation in violation of the uniformity clause."¹⁹⁵ In *State ex rel. Baker Manufacturing Co. v. City of Evansville*,¹⁹⁶ the court held that the

190. 163 Wis. 626, 158 N.W. 317 (1916).

191. *Town of Menominee v. Skubitz*, 53 Wis. 2d 430, 439, 192 N.W.2d 887, 891 (1972).

192. 178 Wis. 240, 189 N.W. 543 (1922).

193. 149 Wis. 2d 220, 440 N.W.2d 575 (1989).

194. 42 Wis. 2d 149, 166 N.W.2d 184 (1969).

195. *Id.* at 160, 166 N.W.2d at 190. An assessment ratio is the percentage of fair market value at which a taxation district assesses. It is calculated by the Department of Revenue under Wisconsin Statutes section 70.575 (1991-92) for the state forestation tax, although it is also used in calculating aid payments such as shared revenue and school aids. The Department makes its own assessment of a sample of property in a district and then compares the district's assessments of that property. Although Wisconsin Statutes section 70.32 (1991-92) requires assessment at fair market value, many taxation districts do not comply. Wisconsin Statutes section 70.05 is designed to improve compliance.

196. 261 Wis. 599, 53 N.W.2d 795 (1952).

difference between the assessment ratio (the ratio of assessed value to actual value) for the plaintiff's personal property and the ratio for its real property violated the uniformity clause.

One of the more bizarre cases in which an assessment was challenged on the basis of the uniformity clause is *State v. Board of Review*.¹⁹⁷ Rather than comparing the challenged assessment to the requirements of the uniformity clause, the court gave great weight to statistics that the assessor furnished. The coefficient of dispersion of a number of that assessor's valuations were within the range that the Department of Revenue considered satisfactory. The court seemed to conclude from those statistics that the assessor was assessing uniformly. Thus, the taxpayer had not proved a constitutional violation.

Unfortunately, there is an inconsistent case on the issue of assessment methods. In *State ex rel. Hensel v. Town of Wilson*, the court held that "[u]nder the rule of uniformity, the appellant should be allowed, as here, to demonstrate that, despite the fact that he has paid a fair price for the property, the assessments of comparable property were significantly lower."¹⁹⁸ The court alluded to the two most common methods of determining fair market value: using the price paid in a recent arm's-length sale as the basis and comparing the property to similar properties ("comparables") that have been valued. The court chose an appropriate precedent, *State ex rel. Enterprise Realty Co. v. Swiderski*,¹⁹⁹ which held that if there has been a recent arm's-length sale, the sale price must be the basis of the assessed value. The court used the case instead, however, to argue that, despite a recent sale, comparables should be considered.²⁰⁰ Seven other cases, two before *Hensel* and five after it, have the same holding as *Enterprise Realty*.²⁰¹

The burden of proof borne by a taxpayer in attacking an assessment on uniformity grounds is considerable, as *State ex rel. Fort Howard Paper Co.*

197. 164 Wis. 2d 31, 473 N.W.2d 554 (Ct. App. 1991).

198. 55 Wis. 2d 101, 197 N.W.2d 794 (1972).

199. 269 Wis. 642, 70 N.W.2d 34 (1955).

200. *Hensel*, 55 Wis. 2d at 105, 197 N.W.2d at 796.

201. See *Darcel v. City of Manitowoc Bd. of Review*, 137 Wis. 2d 623, 405 N.W.2d 344 (1987); *Bischoff v. City of Appleton*, 81 Wis. 2d 612, 260 N.W.2d 773 (1978); *State ex rel. Geipel v. City of Milwaukee*, 68 Wis. 2d 726, 229 N.W.2d 585 (1975); *State ex rel. Markarian v. City of Cudahy*, 45 Wis. 2d 683, 173 N.W.2d 627 (1970); *State ex rel. Evansville Mercantile Ass'n v. City of Evansville*, 1 Wis. 2d 40, 82 N.W.2d 899 (1957); *Fontana v. Village of Fontana-on-Geneva Lake*, 107 Wis. 2d 226, 319 N.W.2d 900 (Ct. App. 1982), *aff'd*, 111 Wis. 2d 215, 330 N.W.2d 211 (1983); *State ex rel. Wisconsin Edison Corp. v. Robertson*, 99 Wis. 2d 561, 299 N.W.2d 626 (Ct. App. 1980).

v. *State*²⁰² illustrates. The court cited the rule that the assessor's valuation is prima facie correct.²⁰³ The plaintiff's demonstration that during one year its assessment increased by fifty-seven percent, although the assessment of residential property in its taxation district remained constant, did not convince the court.²⁰⁴ The court also held that unless the taxpayer could show that it was improperly assessed, it could not successfully attack the constitutionality of an assessment plan under which one-fourth of the manufacturing property in a district was reassessed from actual view every year. Although the paper company showed that the assessments of the revalued property rose much more than the assessments of other property, that showing had no effect on the court.²⁰⁵ An argument can be made that the court ought to have considered the possibility that cyclical revaluation is per se nonuniform. Even if that process would eventually create uniform treatment, there is a difference between paying a higher tax for four years and paying a higher tax for one year.

Like other taxes, the property tax is computed by multiplying a base by a rate. If the base (assessed value) is subject to the uniformity requirement, the rate should be as well. The court in *Knowlton* held: "The valuation must be uniform, the rate must be uniform."²⁰⁶ There are no cases in which the rate by itself, rather than in combination with the base, is at issue. A court would no doubt find unconstitutional the application of different rates to different property.

Only one case, *Sigma Tau Gamma Fraternity House Corp. v. City of Menomonie*,²⁰⁷ deals with the uniformity clause's relation to the payee of property taxes. That case is important because it holds that tax incremental financing, a major economic development tool that significantly affects the property tax system and local finance, does not violate the uniformity clause or any other constitutional provision. Under the Tax Increment Law,²⁰⁸ any city may, after complying with certain procedural requirements including obtaining the permission of a review board, create a tax incremental district. The city may then make expenditures to facilitate development in that district. For fifteen years after the last expenditure or until the district is dissolved, whichever occurs first, the taxes imposed on the property in the

202. 82 Wis. 2d 491, 263 N.W.2d 178 (1978).

203. *Id.* at 508, 263 N.W.2d at 186-87.

204. *Id.* at 508, 263 N.W.2d at 187.

205. *Id.* at 510, 263 N.W.2d at 187.

206. *Knowlton v. Board of Supervisors*, 9 Wis. 378, 389 (1859).

207. 93 Wis. 2d 392, 288 N.W.2d 85 (1980). The result as it relates to the uniformity clause comports with 65 Op. Att'y Gen. 194 (1976).

208. WIS. STAT. § 66.46 (1991-92).

district minus the taxes that would have been imposed on the property on the basis of its value before the creation of the district (the difference is the tax increment) are not paid to all the taxing jurisdictions that contain the property but to a special fund from which money is drawn to repay the city for its expenditures in the district. Those taxes are paid by all of the city's taxpayers, not only by the taxpayers in the district. The court concluded that this arrangement merely changes the payee of the taxes.²⁰⁹ The court failed to note many other effects of that law.

Quite aside from the question of whether the Tax Incremental Law is effective as an economic development tool,²¹⁰ the law precludes taxing jurisdictions other than the city that created the district from taxing the incremental value of the property in the district. This includes not only the increment caused by the city's expenditures and development allegedly induced by that creation, but also the increment caused by other factors such as the normal appreciation of property values. Because the mill rate for the state forestation tax is set by statute,²¹¹ creating a tax incremental district does not affect the state tax paid by persons who do not own property in the district. Creating it will slightly reduce the amount of money available for state forestation purposes. Taxpayers in special districts that include the tax incremental district may be affected, depending on the scenario that applies. Their mill rates may increase because the tax increment is not subject to their district's tax. That effect will not be great because the levy of most special districts is not great. The taxing jurisdictions that may be subject to major effects are counties, school districts, and vocational, technical, and adult education districts. Residents of the city may be subject to higher taxes for the same reasons that residents of the other jurisdictions may be subject to them, and they certainly will have to pay the taxes on the increase in the district's value.

209. *Sigma Tau Gamma*, 93 Wis. 2d at 412, 288 N.W.2d at 94.

210. To assess benefits in a specific instance one must work through the three possible scenarios: (1) that development would not have occurred during the existence of the tax incremental district but for the creation of that district; (2) that the same development would have occurred even without creation of the district; and (3) that development of another kind would have occurred in that district had not the development induced by the creation of the district precluded it. To determine, under the first scenario, whether creation of the district would result in economic development, the following must be estimated: (1) whether jobs were actually created or merely transferred from other businesses; (2) whether the increased services required to be funded by the city and the loss of shared revenue are balanced by the benefits to the district; and (3) whether the detriments to other businesses in the city are balanced by the benefits to the businesses aided by the creation of the district.

211. WIS. STAT. § 70.58 (1991-92).

Tax incremental financing also has had an impact on major state aid payments. The basic theory of school aid²¹² is that the levy rate that a school district is willing to impose on itself, not the value of the taxable property in that district, should determine the revenue available to the district. The state equalizes the property tax base of school districts by distributing aid based in part on a guaranteed valuation. That is, allowing for certain disequalizing factors in the formula,²¹³ the state will pay a dollar in school aid to recompense a district for every dollar it loses because its property tax base is lower than average. Until recently, the creation of a tax incremental district affected school aid payments because the property tax base of the district for calculating school aid was the full value of the property in the district, excluding a minor adjustment but including the value of tax increments,²¹⁴ even though the district received no part of the tax on that increment. School districts that contained tax incremental districts received supplemental aid that partially reimbursed them for the lost taxes,²¹⁵ but that aid was not fully funded. Therefore, these school districts lost some revenue. Under an act that took effect August 1993, in calculating school aid, the value of the tax increment is excluded and supplemental aid is no longer disbursed.²¹⁶

Similarly, state aid to vocational, technical, and adult education districts²¹⁷ is based partly on an equalization index designed to assist property-poor districts in generating needed revenue. That index is based partly on the full value of the taxable property in the district, including tax increments.²¹⁸ Therefore, creation of a tax incremental district in a vocational, technical, and adult education district will lower the district's state aid without increasing its property tax base.

Shared revenue payments²¹⁹ are made to municipalities and counties by a formula designed in part to provide additional revenue for property-poor jurisdictions. In determining the tax base for that formula, tax increments are included for municipalities and excluded for counties. Cities, therefore, receive less shared revenue. This loss in shared revenue increases the burden of other property taxpayers in the city. Although the uniformity clause

212. WIS. STAT. ch. 121, subch. II (1991-92).

213. The most significant factor is the preclusion of "negative aid" (property-rich districts paying money that can be sent to property-poor districts). *Buse v. Smith*, 74 Wis. 2d 550, 247 N.W. 2d 141 (1976); see *infra* text accompanying note 249.

214. WIS. STAT. § 121.004(2) (1991-92).

215. WIS. STAT. § 121.085 (1991-92).

216. 1993 Wisconsin Act 16.

217. WIS. STAT. § 38.28 (1991-92).

218. WIS. STAT. § 38.28(1m)(b).

219. WIS. STAT. ch. 79, subch. I (1991-92).

is irrelevant to the size of a property tax levy, these effects indicate that it is inadequate to limit a uniformity clause analysis of tax incremental financing to determining who is the payee.

Moreover, the uniformity clause's prohibition of partial property tax exemptions is relevant to tax incremental districts. At first glance, property in a tax incremental district is not partially exempt. Such property is assessed as is other property in the city, and the same rate is applied to it that is applied to other property located in the same taxing jurisdictions. This reasoning provided a basis for the court to find uniformity in *Sigma Tau Gamma*.

In reality, however, something quite different occurs. The property taxes on the tax increment do not go to the taxing jurisdictions; rather, they go to the tax incremental fund to repay project costs. Some of those costs, such as those for public improvements,²²⁰ would ordinarily be funded by special assessments imposed on the property that benefitted from them. The reality in regard to those costs is that the property indirectly receives a partial exemption in the amount of the special assessments that it would pay but for the creation of the tax incremental district. Other costs are professional service costs, capital costs, financing costs, real property assembly costs, and several other costs, nearly all of which would ordinarily be borne by the property owner. The property indirectly receives a partial exemption in the amount of those costs because the owner actually receives a loan from the city and pays back a small part of it (the other taxpayers in the city pay most of it) annually by depositing a sum in the tax incremental fund. The owner of property in a tax incremental district also receives a partial exemption for the taxes levied on that property by other taxing jurisdictions.

The next stage in the property tax process, enforcement, has rarely been litigated in uniformity clause cases. At issue in *State ex rel. Hammermill Paper Co. v. La Plante*²²¹ was a statutory provision specifying that unpaid taxes on property to which the industrial projects law²²² applies do not become a lien. The court held that "[a] lien is not an essential element of uniform taxation."²²³ The plaintiff in *State ex rel. Blockwitz v. Diehl*²²⁴ argued that holders of tax certificates were treated nonuniformly because counties were directed by statute to buy land if the taxes on it were delin-

220. See WIS. STAT. § 66.46(2)(f) (1991-92).

221. 58 Wis. 2d 32, 205 N.W.2d 784 (1973).

222. See WIS. STAT. § 66.521(9) (1973).

223. *Hammermill*, 58 Wis. 2d at 73, 205 N.W.2d at 807.

224. 198 Wis. 326, 223 N.W. 852 (1929).

quent. Rather than holding that enforcement of property taxes was not subject to the uniformity clause, the court held that uniformity applied throughout the county with respect to the treatment of tax certificates.²²⁵ These two cases conflict on whether the uniformity clause applies to enforcement. However, *Hammermill* was decided much later and appears to take a more logical approach.

The court has found that the uniformity clause is irrelevant to boards of review. Except for negotiation with an assessor and appeals to a board of assessors in municipalities that have such boards, the first forum for appealing a property tax assessment is the board of review.²²⁶ The court in *State ex rel. Milwaukee Street Railway v. Anderson*²²⁷ decided that differences in forming a board of review do not violate the uniformity clause. In another early case, *Strange v. Oconto Land Co.*,²²⁸ at issue was a statute that directed one town to assess property of another town if the latter did not assess its own property. Furthermore, the statute provided that there would be no board of review in towns that did not assess their own property. The court found no violation of the uniformity clause, not because the clause is inapplicable to enforcement, but because the statute covering this type of assessment predated the statute requiring boards of review. The result seems correct, although the reasoning is unusual.

Uniformity clause cases about the use of property tax revenue present unusual difficulties. Three such cases involved the use of property taxes to pay certain costs. In the first, *State ex rel. McCurdy v. Tappan*,²²⁹ the challenged statute required the Town of Oshkosh, but no other municipality, to reimburse another municipality for an incorrect bounty payment to a Civil War veteran. According to the court, this differential treatment and required payment in the absence of a local benefit caused the statute to violate the uniformity clause.²³⁰ In *Milwaukee County v. Halsey*,²³¹ one of the counties that was required to supplement the state salary paid to a circuit judge alleged that the uniformity clause was violated because that requirement did not apply to some other counties. The court, as it had in other cases that presented conceptual difficulties, resorted to classifying property and finding uniformity within each classification.²³² In a similar case,²³³ at

225. *Id.* at 333, 223 N.W. at 855.

226. WIS. STAT. § 70.47 (1991-92).

227. 90 Wis. 550, 63 N.W. 746 (1895).

228. 136 Wis. 516, 117 N.W. 1023 (1908).

229. 29 Wis. 664 (1872).

230. *Id.* at 678.

231. 149 Wis. 82, 136 N.W. 139 (1912).

232. *Id.* at 93, 136 N.W. at 143.

issue was the payment of property taxes to fund a reassessment. The court considered this to be a local expense, so the levying of local taxes for it did not violate the uniformity clause.²³⁴ These cases seem to conflict, but perhaps the distinguishing characteristic is that in the first case, the tax payment was not used to fund a municipal expense but rather to compensate an individual for services rendered to the nation. This distinction, however, has at best a tangential relation to the purposes of the uniformity clause.

In more difficult cases about the use of property tax revenue, a party argued that some owners of property were being taxed for enterprises that did not benefit them. In *Thielen v. Metropolitan Sewerage Commission*,²³⁵ the plaintiff argued that a property tax was levied partly to fund bonds that would not benefit some of the property taxed. The court, however, found that all the taxed property would benefit in some way from the funded bonds.²³⁶ In other cases, the plaintiffs did show that the use of the tax proceeds did not benefit the taxed property. In the most recent of those cases, but not in the six earlier ones, the court held that the uniformity clause was violated.

Three of the early cases involved municipalities that were required by statute to contribute funds for a bridge that was constructed in another municipality in the same county. The court in those three cases found no violation of the uniformity clause, although the court used different rationales. In *State ex rel. Town of Baraboo v. Board of Supervisors*,²³⁷ the town decided to build a bridge, but because the cost exceeded a certain percentage of the town's equalized value, it billed the county for half the cost, as authorized by statute. The county, under the same statute, was not allowed to collect funds to pay that cost by levying a tax on municipalities that maintained their own bridges. The court held that such a scheme did not violate the uniformity clause because it operated in the same way throughout the state.²³⁸ In *Rinder v. City of Madison*,²³⁹ at issue was a levy, for bridges, on Dane County, including Madison, even though Madison's streets were not part of the county highway system. The court looked at the law's operation in two geographical contexts: "It is a general law operating uniformly throughout the state and upon the residents within each

233. See *State ex rel. Attorney Gen. v. Hammerlund*, 159 Wis. 315, 150 N.W. 512 (1915).

234. *Id.* at 318, 150 N.W. at 513.

235. 178 Wis. 34, 189 N.W. 484 (1922).

236. *Id.* at 56, 189 N.W. at 492-93.

237. 70 Wis. 485, 36 N.W. 396 (1888).

238. *Id.* at 489, 36 N.W. at 397-98.

239. 163 Wis. 525, 158 N.W. 302 (1916).

county.”²⁴⁰ In *State ex rel. Owen v. Stevenson*,²⁴¹ the taxpayer argued that the proceeds of a county tax were used to pay for bridges benefiting another county and that some municipalities that had built bridges without aid were required to help pay for other municipalities’ bridges. The court declined to assess benefits and their relation to burdens,²⁴² stating that “[w]ant of uniformity of taxation does not exist in a *local sense* unless a different rate of taxation is imposed on like property within the same jurisdiction.”²⁴³ The implication that the uniformity clause is irrelevant to the use of revenue is promising.

In two of the three other cases of this type in which no violation of the uniformity clause was found, the court, as it did in *Baraboo* and *Rinder*, tested uniformity within the jurisdiction that levied the tax. A county levy to pay a sum to the state was approved by the court in *Lund v. Chippewa County*²⁴⁴ because the levy operated uniformly throughout the county. An opposite financial arrangement existed in *State ex rel. City of New Richmond v. Davidson*.²⁴⁵ The state appropriated money to forgive a trust fund loan made to New Richmond. The court in that case also made a geographical-scope analysis but concluded, somewhat unconvincingly, that the whole state benefitted from the expenditure. In *Columbia County v. Wisconsin Retirement Fund*,²⁴⁶ the other case in which the court found no violation of the uniformity clause, the court made explicit that which was implicit in *Owen*: “The state aids and taxes allocated to a county are not collected or returned by the county by any method or in any sense contemplated by sec. 1, art. VIII.”²⁴⁷ It added that this case dealt with the distribution of revenue, “not with the assessment or collection of direct taxes on real estate.”²⁴⁸ After *Columbia County*, the line between property tax issues that are subject to the uniformity clause and those that are not seemed logical: The line lay just after the collection of the revenue.

However, in *Buse v. Smith*,²⁴⁹ the line moved. This case is significant because it prevented the reallocation of vast sums of money. In spite of the seven cases beginning with *Baraboo* and ending with *Columbia County*, the court held that the uniformity clause applied to the use of revenue and that,

240. *Id.* at 531, 158 N.W. at 304.

241. 164 Wis. 569, 161 N.W. 1 (1917).

242. *Id.* at 580, 161 N.W. at 5.

243. *Id.*

244. 93 Wis. 640, 67 N.W. 927 (1896).

245. 114 Wis. 563, 88 N.W. 596 (1902).

246. 17 Wis. 2d 310, 116 N.W.2d 142 (1962).

247. *Id.* at 325, 116 N.W.2d at 150.

248. *Id.*

249. 74 Wis. 2d 550, 247 N.W.2d 141 (1976).

under the clause, property-rich school districts may not be forced to levy taxes to produce revenue that can be cycled through the school aid formula to pay aids to property-poor school districts.²⁵⁰ To support its analysis of the plaintiff's uniformity clause argument, the court cited *Owen* and *New Richmond*.²⁵¹ However, the court adverted only to the public purpose section of the former, and the uniformity clause was not even an issue in the latter. The court then turned to *Lund*, in which it conceded that there was no uniformity clause violation and remarked that the levy at issue was voluntary. The court cited dicta in *Lund* to the effect that the result would be different if the levy were mandatory. The court did not mention that earlier cases had approved a mandatory expense that was paid for with property tax revenue. The court then cited some dicta from a variety of cases, including a railroad case, in regard to public purpose. The negative aid scheme may be unconstitutional under the public purpose doctrine or under another doctrine, but *Buse* badly distorted the uniformity clause case law by confusing doctrines, ignoring relevant precedents, and citing dicta.

In summary, the case law on the uniformity clause does not reveal a point in the property tax process where a definite line can be drawn separating the events to which the clause applies from those to which it does not apply. A line can be drawn immediately after the collection of revenue, but anomalous cases on both sides of that line cast doubt on the correctness of its location.

Courts have also tried a conceptual approach, attributing different qualities to the elements of the system to which the clause applies than to the elements to which it does not apply. The first attempt of that kind occurred in *Knowlton*, in which the court mandated that "the course or mode of proceeding in levying or laying taxes shall be uniform."²⁵² Unfortunately, that category is very general. In another early case the court held that "[t]he machinery of taxation—the mode of levying, assessing, and collecting—is subject entirely to [the legislature's] discretion."²⁵³ This holding moves the "mode of levying" the tax to the side of the line opposite where *Knowlton* placed it. Much later, in *Gottlieb v. City of Milwaukee*,²⁵⁴ the court used a similar metaphor: "There can be variations in the mechanics of property assessment or tax imposition so long as the resulting taxation

250. *Id.* at 579, 247 N.W.2d at 155. This type of arrangement is sometimes called negative aid. See *id.* at 573, 247 N.W.2d. at 152.

251. *Id.* at 577, 247 N.W.2d at 153-54.

252. *Knowlton v. Board of Supervisors*, 9 Wis. 378, 389 (1859).

253. *Smith v. Cleveland*, 17 Wis. 556, 565 (1863).

254. 33 Wis. 2d 408, 147 N.W.2d. 633 (1967).

shall be borne with as nearly as practicable equality on an ad valorem basis with other taxable property."²⁵⁵

Other courts have drawn a contrast not between abstract principles and machine-like methods, but between important and unimportant considerations. One court wrote that assessing value and applying rates must be uniform, but "[l]aws as regards mere details, designed to be aids in applying the rule, may or may not violate it according as they reasonably are in furtherance of it or are manifestly otherwise."²⁵⁶ In other words, a standard other than uniformity applies to "details." Similarly, according to an early court, "[a]bsolute uniformity in every detail in the assessment of property is impracticable, if not unattainable."²⁵⁷ The difficulty with this approach is in determining whether a statutory provision or an administrative action is merely a detail or whether it implicates "the rule." Although this conceptual approach is flexible enough to ignore trivialities, it is also too vague to be of much use to judges who are looking for rational principles for deciding uniformity clause cases.

VII. PROPERTY TAX RELIEF

Despite the anomalies of *Buse v. Smith*,²⁵⁸ a long sequence of cases indicates that a discrepancy in benefits received from tax revenue by a taxing jurisdiction does not violate the uniformity clause. In fact, *Columbia County v. Wisconsin Retirement Fund*²⁵⁹ suggests that the court may now be unwilling to apply the uniformity clause to the use of tax revenue. However, *State ex rel. La Follette v. Torphy*²⁶⁰ recently established a logical exception to the general rule implicit in *Columbia County*. The relation between the uniformity clause and property tax relief,¹ at issue in *Torphy*, has become increasingly important. *Torphy* involved the Improvements Tax Relief Law, under which an income tax credit would offset increases in property taxes that resulted from improvements to houses and garages. Although some eligibility requirements related to claimants, the court held that the credit was based on "characteristics of particular properties and not those of the taxpayer."²⁶¹ Therefore, the credit was part of the property tax process and had to conform to the uniformity clause. The court distinguished *Columbia County* on the grounds that the credit in *La Follette* was

255. *Id.* at 424, 147 N.W.2d at 641-42.

256. *Chicago & N.W. Ry. v. State*, 128 Wis. 553, 613, 108 N.W. 557, 570 (1906).

257. *Wisconsin Cent. R.R. v. Lincoln County*, 57 Wis. 137, 142, 15 N.W. 121, 123 (1883).

258. 74 Wis. 2d 550, 247 N.W.2d 141 (1976).

259. 17 Wis. 2d 310, 116 N.W.2d 142 (1962).

260. 85 Wis. 2d 94, 270 N.W.2d 187 (1978).

261. *Id.* at 104, 270 N.W.2d at 191.

a payment to individuals that reduced their property tax burden and thus created a partial exemption in violation of the uniformity clause.²⁶² That is, the use of tax revenue to reduce individuals' property taxes may violate the uniformity clause.

The uniformity clause may apply also to aids granted to jurisdictions that impose property taxes or to individuals subject to those taxes. That issue has major significance because a very large portion of the state budget is devoted to those aids. For example, under the state budget bill for the 1991-93 biennium, 38.2% of the expenditures were made for local assistance. Two major programs of this kind, general school aids and shared revenue,²⁶³ have been dealt with in passing. Both are direct payments calculated by elaborate formulas that include equalizing factors designed to aid property-poor jurisdictions. Those aids probably do not violate the uniformity clause because their relation to property tax obligations is tenuous, partly because a taxing jurisdiction that receives aid will not necessarily reduce property taxes accordingly.

The third giant state aid program, Wisconsin State Property Tax Relief (WSPTR),²⁶⁴ presents a more complicated problem because a statute directs that funds allocated to taxing jurisdictions under it shall directly reduce the property tax bills of the owners of property in the jurisdictions.²⁶⁵ Those aid payments are reflected as property tax credits. Because of the direct crediting, it would seem that *La Follette* is a relevant precedent and that WSPTR is subject to the uniformity clause. Because the payment is allocated proportionally to property tax bills, there is uniformity in the sense of treating all taxpayers alike.

Municipalities reallocate WSPTR funds to other taxing jurisdictions for which they collect taxes. That reallocation is proportional, based on amounts levied by those jurisdictions and applied to the property tax bills issued by the municipality. This multijurisdictional nature of the property tax bill perhaps creates another uniformity clause problem because the amount of the credit is computed initially for municipalities, which are not coterminous with other jurisdictions. As a result, two taxpayers owning property located in the same county, school district, or vocational, technical, and adult education district, and subject to the same total amount of gross property taxes, probably will not receive the same WSPTR credit and thus will not have the same net property tax bill.

262. *Id.* at 105-08, 270 N.W.2d at 192.

263. See WIS. STAT. ch. 121, subch. II and ch. 78, subch. I (1991-92).

264. WIS. STAT. ch. 79, subch. II (1991-92).

265. See WIS. STAT. § 79.10(9) (1991-92).

WSPTR is subject to another possible uniformity clause problem because it is directly applied to property tax bills. An argument can be made that WSPTR, therefore, creates a partial exemption similar to the one that the court disapproved in *La Follette*. The taxpayer does not pay the total bill and later receive a check for the amount of the credit. Moreover, this credit does not have the attributes that, as we shall see in the next paragraph, induced the court to approve the homestead credit. Thus, in regard to both uniformity in the usual sense and partial exemption, case law does not allow a confident prediction that a court would find WSPTR constitutional under the uniformity clause.

The uniformity clause may also apply to other programs under which the state uses its revenue or forgoes collecting revenue in order to lighten property tax burdens. In *State ex rel. Harvey v. Morgan*,²⁶⁶ the court held that the homestead credit,²⁶⁷ which either reduces income tax liability or results in a direct payment to a citizen, does not violate the uniformity clause. In fact, the court found the credit to be a relief provision, not a property tax provision; thus, the uniformity clause does not even apply to the homestead credit.²⁶⁸ In arriving at its conclusion, the court was swayed by the revised statement of the credit's purpose, which alluded to the police power, the income test of eligibility, the payment of the credit to renters, the credit's connection to the income tax, and the fact that recipients of the credit pay their full property tax bills.²⁶⁹ The court distinguished *Ehrlich* on the ground that the contract in *Ehrlich* "directly related to specific property taxes"²⁷⁰ and bargained away "the city's police power to levy taxes."²⁷¹ However, the unit of government offering the credit should not matter under the uniformity clause analysis. The reference to the police power to tax is confusing in light of the court's approval of the homestead credit partly as an instance of the police power. It is also confusing in light of earlier uniformity clause cases in which the court contrasted the taxing power and the police power. The point about the specificity of the arrangement in *Ehrlich* compared to the more complicated formula and purpose of the homestead credit is more convincing.

The school property tax credit²⁷² resembles the homestead credit because it is part of the income tax system, it does not directly reduce prop-

266. 30 Wis. 2d 1, 139 N.W.2d 585 (1966).

267. See WIS. STAT. ch. 71, subch. VIII (1991-92).

268. *Harvey*, 30 Wis. 2d at 10, 139 N.W.2d at 588-89.

269. *Id.* at 13-14, 139 N.W.2d at 590-91.

270. *Id.* at 15, 139 N.W.2d at 591.

271. *Id.*

272. See WIS. STAT. § 71.07(9) (1991-92).

erty tax bills (although it is measured by property taxes or by rent constituting property taxes), and it is available to renters. However, the school property tax credit differs from the homestead credit because it does not have an income test. Since the similarities appear to outweigh the difference, a court would probably find that this credit does not create a partial exemption.

Property tax deferral²⁷³ allows certain elderly homeowners to defer payment of property taxes until their death or until their home is sold. The program has an income test and defers rather than reduces property taxes. Thus, there is an increased likelihood that property tax deferral is constitutional, although the Attorney General opined that an earlier bill that would have created a similar program would be unconstitutional.²⁷⁴

The uniformity clause is also a factor for certain economic incentive programs that use revenue or forgo the collection of property tax revenue. Cases on tax incremental financing,²⁷⁵ the improvements tax relief credit,²⁷⁶ and the Urban Redevelopment Law²⁷⁷ have been discussed. A law review note and an Attorney General's Opinion²⁷⁸ argued cogently that a similar statutory provision granting a tax exemption for property in a conservation district²⁷⁹ was unconstitutional. The uniformity clause thus supplies resistance to legislative efforts to fashion economic incentives for the development of land.

In contrast, the 1927 amendment to article VIII, section 1, which allows differential treatment of forests and agricultural land, makes it possible to create constitutional property tax incentives for certain programs that are designed to prevent development by retaining land in its current condition. Those programs are the forest croplands law,²⁸⁰ the woodland tax law,²⁸¹ the managed forest land program,²⁸² and the farmland preservation credit.²⁸³ The 1974 amendment to the uniformity clause allowed taxation of agricultural land in ways that are not uniform with the taxation of other property, although the taxation of any agricultural property must be uni-

273. See WIS. STAT. §§ 16.993-997 (1991-92).

274. 52 Op. Att'y Gen. 257 (1963).

275. See *Sigma Tau Gamma Fraternity Corp. v. City of Menomonie*, 93 Wis. 2d 392, 288 N.W.2d 85 (1980).

276. See *State ex rel. La Follette v. Torphy*, 85 Wis. 2d 94, 270 N.W.2d 187 (1978).

277. See *Gottlieb v. City of Milwaukee*, 33 Wis. 2d 408, 147 N.W.2d 633 (1967).

278. See generally 66 Op. Atty. Gen. 326 (1977); Kinnamon, *supra* note 2.

279. WIS. STAT. § 70.11(24) (1963).

280. WIS. STAT. ch. 77, subch. I (1991-92).

281. WIS. STAT. § 77.16 (1991-92).

282. WIS. STAT. ch. 77, subch. VI (1991-92).

283. WIS. STAT. ch. 71, subch. IX (1991-92).

form with the taxation of all other agricultural property. That requirement was the subject of *McManus v. Department of Revenue*,²⁸⁴ which involved a challenge to the farmland preservation credit. The taxpayer argued that the statute under which owners of farmland could not receive the credit if their family's income was above a certain level was unconstitutional because it resulted in differential treatment of taxpayers who in all relevant respects except their family income were identical. The court decided that the farmland preservation credit, like the homestead credit, was a relief measure and thus not subject to the uniformity clause, even though its income limit was close to \$40,000.

VIII. THE GEOGRAPHICAL AREA OVER WHICH UNIFORMITY IS TESTED

As we have seen, the geographical area over which uniformity must prevail is occasionally a crucial issue. Most courts agree that the tax must be uniform throughout the jurisdiction that levies it. As with other uniformity clause issues, there are a few maverick cases. Again, *Knowlton v. Board of Supervisors*²⁸⁵ is the seminal case. One reason for the acceptance of the rule appeared in *Jensen v. Board of Supervisors*,²⁸⁶ a case where the use of funds was subject to the rule of uniformity. At issue was a requirement that counties build roads, thus burdening counties differently. The court recognized that, if it applied a statewide standard of uniformity, no tax could withstand scrutiny.²⁸⁷ In *Lund v. Chippewa County*,²⁸⁸ the court clearly stated that the taxing unit is the unit over which a tax must be uniform. In *Village of West Milwaukee v. Area Board of Vocational, Technical & Adult Education*,²⁸⁹ the court, although recognizing the statewide importance of education, held that the tax to support it was levied by each vocational, technical, and adult education district, and that uniformity within each district sufficed.²⁹⁰

One of the few cases that takes a different view of the uniformity clause's geographical scope is *State ex rel. Town of Baraboo v. Board of Supervisors*.²⁹¹ In validating a requirement that certain municipalities help pay for bridges in other counties, the court noted that the use of funds,

284. 155 Wis. 2d 450, 455 N.W.2d 906 (Ct. App. 1990).

285. 9 Wis. 378 (1859).

286. 47 Wis. 298, 2 N.W. 320 (1879).

287. *Id.* at 314, 2 N.W. at 331-32.

288. 93 Wis. 640, 67 N.W. 927 (1896).

289. 51 Wis. 2d 356, 187 N.W.2d 387 (1971).

290. *Id.* at 379-80, 187 N.W.2d at 397-98.

291. 70 Wis. 485, 36 N.W. 396 (1888).

without a direct reduction of property tax bills, must be uniform. Yet the court did not hold, as did the court in *Jensen*, that uniformity within a taxing jurisdiction is all that is required. Rather, the court held that the statute requiring the payments operated uniformly throughout the state.²⁹² In a later bridge case, *Rinder v. City of Milwaukee*,²⁹³ the court combined the views of *Jensen* and *Baraboo*: "It is a general law operating uniformly throughout the state and upon the residents within each county."²⁹⁴ Perhaps in these three bridge cases it would have been better to hold that, unless there is a direct reduction of property tax bills, the use of revenue need not be uniform. Absent that holding, the approach in *Jensen* is best for the reasons stated in that opinion.

Like the court in *Rinder*, the court in *Chicago & Northwestern Railway v. State*²⁹⁵ used two geographical criteria. As stated earlier, the latter case is quite confusing. At one point, the court asserted that "[a]ll taxation on property, as near as practicable, shall bear thereon, relatively equally as to value, throughout the state."²⁹⁶ Specifically, it stated that determination of value and application of rates must be uniform statewide.²⁹⁷ At another point, however, the court spoke of unity "throughout each taxing jurisdiction."²⁹⁸

Thus, two of the cases that demand statewide uniformity for a local tax are equivocal, and the third conflicts with other cases brought on similar facts and probably should have been decided on other grounds. The best, most commonly accepted rule is that uniformity is required throughout the taxing jurisdiction that levies the tax.

IX. CLASSIFICATION OF PROPERTY

The issue of classification has arisen in several different contexts. Therefore, a more extensive treatment of it would be useful. The initial inquiry is whether any classification is constitutionally permissible. In *Knowlton v. Board of Supervisors*,²⁹⁹ the court held that classification is equivalent to instituting different rules of taxation and is therefore unconstitutional.³⁰⁰ As we have seen, another sequence of early cases approved classification,

292. *Id.* at 489, 36 N.W. at 398.

293. 163 Wis. 525, 158 N.W. 302 (1916).

294. *Id.* at 531, 158 N.W. at 304.

295. 128 Wis. 553, 108 N.W. 557 (1906).

296. *Id.* at 608, 108 N.W. at 569.

297. *Id.* at 612, 108 N.W. at 570.

298. *Id.* at 614, 108 N.W. at 571.

299. 9 Wis. 378 (1859).

300. *Id.* at 390-91.

but required uniformity within a class. The *Knowlton* view has prevailed. In *Chicago & Northwestern Railway v. State*,³⁰¹ which is otherwise problematical, the court correctly held that "[f]or the direct method, the constitution puts all property chosen therefor into one class."³⁰² A more recent case, *Gottlieb v. City of Milwaukee*,³⁰³ propounded a list of uniformity clause principles, the first of which is "[f]or direct taxation of property, under the uniformity rule there can be but one constitutional class."³⁰⁴

However, classification of matters to which the uniformity clause does not apply, such as "mere details," is valid. Classification between exempt and taxable property is generally valid—a result of the legislature's power under the uniformity clause to specify the property that is taxable. One of the principles expressed in *Gottlieb* is that "the legislature can classify as between property that is to be taxed and that which is to be wholly exempt."³⁰⁵ However, recently the court has held that an exemption may not be granted to only some members of a class.

In several early cases, courts decided that classes with only a few members that exclude apparently similar kinds of property were valid. For example, in *Green Bay & Mississippi Canal Co. v. Outagamie County*,³⁰⁶ the court held that an exemption for Turner Halls was valid because the entire class of Turner Halls was exempt. One could argue that it would have been more reasonable to require exemption of all nonprofit sports and recreational facilities or otherwise make the exempt class broader. Similarly, in *Holt Lumber Co. v. City of Oconto*,³⁰⁷ the court found saw logs to be a reasonable class.

A hint that the court eventually would disapprove of very narrow classes appeared in a dissent in *Wisconsin Central Railroad v. Taylor County*,³⁰⁸ which argued that a temporary exemption granted to one railroad was constitutionally invalid because of its limited application.³⁰⁹ That dissent is sound because the rule it states would help prevent political corruption. Later, the seed planted by that dissent took root. In *Board of Trustees of Lawrence University v. Outagamie County*,³¹⁰ the court ex-

301. 128 Wis. 553, 108 N.W. 557 (1906).

302. *Id.* at 604, 108 N.W. at 567.

303. 33 Wis. 2d 408, 147 N.W.2d 633 (1967).

304. *Id.* at 424, 147 N.W.2d at 641.

305. *Id.*

306. 76 Wis. 587, 45 N.W. 536 (1890).

307. 145 Wis. 500, 130 N.W. 709 (1911).

308. 52 Wis. 37, 96-97, 8 N.W. 833, 856 (1881) (Orton, J., concurring in part and dissenting in part).

309. *Id.* (Orton, J., concurring in part and dissenting in part).

310. 150 Wis. 244, 136 N.W. 619 (1912).

amined a situation in which the university's statutory charter exempted all of its property, whereas a more general statute exempted only up to forty acres of university land. The juxtaposition of those two exemptions required the court to consider the issue of exclusive classes. The court ruled that "[w]hen we are presented with a case in which the exemption is arbitrary and in which other persons of the same class owning property of the same general description are awarded exemptions of a lesser amount, the situation is one in which the rule of uniformity is violated."³¹¹ Similarly, the Attorney General has stated that granting exemptions to one orphan asylum, as well as to property owned by a Wisconsin Lions International club, would violate the uniformity clause.³¹² In light of *Lawrence University*, several current property tax exemptions are suspect.³¹³

One of the more unusual classifications approved by the court was litigated in *Columbia Hospital Ass'n v. City of Milwaukee*.³¹⁴ At issue was the application of an exemption for hospital property³¹⁵ to property that a hospital rented to employees. The court found the upper unit of the building to be exempt and the lower unit to be taxable. The court reasoned that the two parts of the building were "distinct and separate units and can constitute different classifications on the basis of use."³¹⁶

Courts have devised several tests for determining a classification's validity. In *Estate of Heuel v. State*,³¹⁷ the court held that uniformity "means simply taxation which acts alike on all persons similarly situated."³¹⁸ Another approach is to examine not the similarity of the members of each class, but the differences between the members of two classes. In one case, the court found that treating Blue Cross differently from commercial insurers was justified because there were real differences between those two classes and the classification was rational.³¹⁹ A more common test has been reasonableness. In *State v. Whitcom*,³²⁰ the court declined to decide whether a peddler's license was a tax or a means of police power regulation, and it used what appeared to be an equal protection test. That test also was

311. *Id.* at 249, 136 N.W. at 621.

312. *See generally* 54 Op. Att'y Gen. 60 (1965); 40 Op. Att'y Gen. 419 (1951).

313. *See* WIS. STAT. § 70.11 (1991-92).

314. 35 Wis. 2d 660, 151 N.W.2d 750 (1967).

315. *See* WIS. STAT. § 70.11(4m) (1991-92).

316. *Columbia Hosp.*, 35 Wis. 2d at 675, 151 N.W.2d at 757.

317. 4 Wis. 2d 400, 90 N.W.2d 634 (1958).

318. *Id.* at 404, 90 N.W.2d at 637.

319. *Associated Hosp. Serv., Inc. v. City of Milwaukee*, 13 Wis. 2d 447, 472, 109 N.W.2d 271, 283 (1960).

320. 122 Wis. 110, 99 N.W. 468 (1904).

used in *Nash Sales, Inc. v. City of Milwaukee*.³²¹ The *Gottlieb* court was sufficiently confident that this rule was solidly established and added it to the list of uniformity clause principles.³²² Each of these tests has some value, but each is vague. Courts virtually are left to make an ad hoc, almost intuitive determination.

X. REMEDIES FOR SUCCESSFUL UNIFORMITY CLAUSE LITIGANTS

Courts have granted several remedies to successful uniformity clause litigants. Many of the early cases were brought to prevent a taxing jurisdiction from using certain collection methods. The court granted that remedy in the second and third cases in which a violation of the clause was found. In *Weeks v. City of Milwaukee*,³²³ the court issued an injunction to stop a sale of property. In *State ex rel. Attorney General v. Winnebago Lake & Fox River Plankroad*,³²⁴ it quashed a writ of mandamus requiring payment. An unusual remedy was granted in *Ehrlich v. City of Racine*,³²⁵ in which the taxing jurisdiction was the plaintiff and in which the court voided a contract between the parties. A more serious remedy was granted in cases in which the court recognized that if one party was incorrectly assessed, the owner of every other piece of taxable property in the jurisdiction paid an incorrect amount since the total amount levied by the taxing jurisdiction remained constant. For that reason, the court in *Slauson v. City of Racine*³²⁶ voided the jurisdiction's entire levy. In *Knowlton v. Board of Supervisors*,³²⁷ the court ordered a reassessment of the jurisdiction retroactively for four years. In *Tallman v. City of Janesville*,³²⁸ suit was brought by a purchaser of land who had learned that *Knowlton* voided the taxes in question. However, the case was brought before the reassessment. Additionally, the specter of a reassessment extending back seven years encouraged the court at the rehearing of *Kneeland v. City of Milwaukee*³²⁹ to find that the uniformity clause had not been violated. More recently, a common remedy has been ordering the reassessment only of the plaintiff's property.³³⁰

321. 198 Wis. 281, 224 N.W. 126 (1929).

322. *Gottlieb v. City of Milwaukee*, 33 Wis. 2d 408, 424, 147 N.W.2d 633, 641 (1967).

323. 10 Wis. 186 (1860).

324. 11 Wis. 34 (1860).

325. 26 Wis. 2d 352, 132 N.W.2d 489 (1965).

326. 13 Wis. 444 (1861).

327. 9 Wis. 378 (1859).

328. 17 Wis. 73 (1863).

329. 15 Wis. 497 (1862).

330. See, e.g., *State ex rel. Boostrom v. Board of Review*, 42 Wis. 2d 149, 166 N.W.2d 184 (1969).

Courts have devised several tests to determine whether to invalidate a levy. The court in *Hersey v. Board of Supervisors*³³¹ invalidated a levy because, although the improper action applied to only one piece of property, it was intentionally unconstitutional. The intent was indeed clear; the assessor had again omitted the Newhall House, a hotel, from the tax roll even though the court in *Weeks* had held that omission to be a violation of the uniformity clause. Courts have used a good-faith test several times. In *Marsh v. Board of Supervisors*,³³² the court voided an erroneous assessment, since the errors were not made in good faith. A later court followed *Hersey* and *Weeks*, holding that omissions "arising from mistakes of fact, erroneous computations, or errors of judgment"³³³ do not vitiate the tax, but "intentional disregard of the taxing laws, which imposes illegal taxes on those assessed, does vitiate it."³³⁴ In *Chicago & Northwestern Railway v. State*,³³⁵ the court found serious errors to have been made in good faith.

XI. CONCLUSION

It is difficult to find patterns in the enormous amount of case law on the deceptively simple article VIII, section 1 of the Wisconsin Constitution. From the case law, the court in *Gottlieb v. City of Milwaukee*³³⁶ distilled the following principles:

1. For direct taxation of property, under the uniformity rule there can be but one constitutional class.
2. All within that class must be taxed on a basis of equality so far as practicable, and all property taxed must bear its burden equally on an *ad valorem* basis.
3. All property not included in that class must be absolutely exempt from property taxation.
4. Privilege taxes are not direct taxes on property and are not subject to the uniformity rule.
5. While there can be no classification of property for different rules or rates of property taxation, the legislature can classify as between property that is to be taxed and that which is to be wholly exempt, and the test of such classification is reasonableness.
6. There can be variations in the mechanics of property assessment or tax imposition so long as the resulting taxation shall be borne

331. 16 Wis. 198 (1862).

332. 42 Wis. 502 (1877).

333. *Johnston v. City of Oshkosh*, 65 Wis. 473, 477, 27 N.W. 320, 322 (1886).

334. *Id.*

335. 128 Wis. 553, 108 N.W. 557 (1906).

336. 33 Wis. 2d 408, 147 N.W.2d 633 (1967).

with as nearly as practicable equality on an *ad valorem* basis with other taxable property.³³⁷

I suggest adding a caveat that exceptions may be found to most of those principles. The case law on the uniformity clause is not noted for its consistency or clear-headed adherence to well-articulated rules. I also suggest changing the fourth principle to state that the clause in the narrow sense applies only to the property tax. Finally, it is important to recognize that the relevant geographical scope ought to be the jurisdiction that levied the tax, and that the clause should not apply to the disbursement of property tax funds or any other funds unless that disbursement clearly reduces property tax bills.

The story of the uniformity clause cannot be reduced to a brief statement of allegedly black letter law. It contains inconsistencies such as the early floundering and the later wavering, a result of an accommodation sought between the forces urging equality and the forces urging economic development or property tax relief. Judicial illogic occasionally exacerbated those inconsistencies. Moreover, the clause has been applied haphazardly or not at all to major state programs. The most important uniformity cases may be yet to come. This is not to say that uniformity clause case law is a disaster. *Knowlton v. Board of Supervisors*³³⁸ is a brilliant case, the result and reasoning of which have held up for well over 100 years. Most other cases make sense, particularly in light of the clause's ambiguity and the important, complex issues involved in them. The development of the uniformity clause, finally, is about an abstract, indubitable principle in constant contact with the infinitely varied world.

After tracing uniformity clause litigation over more than 130 years, almost the length of time that Wisconsin has been a state, one is tempted to ask whether that clause, as it has been interpreted, has benefitted this state. One commentator has asserted that state uniformity clauses in general have created a good deal of confusion and litigation and not uniformity.³³⁹ The amount of litigation in this state on the uniformity clause is indeed considerable, averaging nearly one appellate court case per year. The clause's most significant effect has been to constrain the legislature, rather than ensure equitable treatment of the small percentage of property owners who have litigated on the basis of the clause. No one can describe, with any justifiable confidence, the property tax system and other statutory schemes closely related to the property tax system that the legislature would have

337. *Id.* at 424, 147 N.W.2d at 641-42.

338. 9 Wis. 378 (1859).

339. NEWHOUSE, *supra* note 10, at 767.

created had the state constitution not included a uniformity clause. At this point there probably is no going back; the chances of repealing the clause are minimal. The task is to go forward, to better understand the clause's economic and social effects, to bring the statutes into better conformity with the clause as it is correctly interpreted, and to resolve inconsistencies and overrule errors in the case law.

